

2012

# I've Looked at Fees from Both Sides Now: A Perspective on Market-valued Pricing for Legal Services

Peggy Kubicz Hall

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

Hall, Peggy Kubicz (2012) "I've Looked at Fees from Both Sides Now: A Perspective on Market-valued Pricing for Legal Services," *William Mitchell Law Review*: Vol. 39: Iss. 1, Article 9.  
Available at: <http://open.mitchellhamline.edu/wmlr/vol39/iss1/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

## **I'VE LOOKED AT FEES FROM BOTH SIDES NOW: A PERSPECTIVE ON MARKET-VALUED PRICING FOR LEGAL SERVICES**

Peggy Kubicz Hall<sup>†</sup>

I. TIMES ARE CHANGING: WHAT'S HAPPENING? .....	159
A. <i>Power to the Purchaser: Supply Exceeds Demand</i> .....	160
B. <i>That Law is Different has "Disappeared Completely"</i> .....	164
C. <i>The Technology Transformers: Knowledge Management         Systems, Artificial Intelligence, and Document         Management Technologies</i> .....	169
1. <i>Knowledge Management</i> .....	172
2. <i>Artificial Intelligence</i> .....	174
3. <i>Document Management Systems and             Predictive Coding</i> .....	177
D. <i>A Flattening World Means an Expanding Brief</i> .....	179
E. <i>Time Keeps on Slipping into the Future</i> .....	182
II. PLUS FACTORS: THE SKILLS OF THE NEW LEGAL ORDER .....	187
A. <i>Talk Your Clients' Talk</i> .....	188
B. <i>Mastering Your Chosen Knowledge Management Tools</i> .....	189
C. <i>Mastering Document Management and Artificial         Intelligence Tools</i> .....	190
D. <i>Master the Finances of Law—Especially Cost and         Profitability Analysis—and Implement         Cost-Improvement Programs</i> .....	192
E. <i>Mastering the Art and Science of Project Management</i> .....	195
F. <i>Break Down Borders: Become Global Thinkers and         Virtual Teamers</i> .....	196
G. <i>"You Know It Don't Come Easy": Master Change         Management Skills</i> .....	197

---

<sup>†</sup> Partner, Greene Espel PLLP. All these views are my own. They do not necessarily represent the views of my firm or my prior employers. I want to thank Carrie Weber, Megan Walsh, Kathy Statler, and Deb Rohan for their research and editing assistance. And as the mother of a rising lawyer, I want to thank my son, Isaac Hall, for a half-year-long running discussion on what these changes mean to the careers of newly graduated lawyers.

III. MAKING THE SHARP SHIFT FROM PRICING AT COST-PLUS TO MARKET-VALUED, PROFIT-DRIVEN PRICING .....	198
A. First, “Get Your Act Together” .....	200
1. Know Your Costs .....	201
2. Know Your Firm’s Financial Needs .....	204
B. Defining Value: It Is in the Eyes of the Beholder .....	205
1. Know Your Client .....	206
2. Consider Factors Supporting a Premium .....	209
3. Consider Factors Supporting an Additional Discount ...	210
4. Consider Whether Project Risks Fairly Affect Price .....	210
a. External Risks .....	211
b. Client Risks .....	211
c. Firm Risks .....	213
5. What Will Competition Do? .....	213
C. Collaborate with the Client to Create a Market-Valued Price Proposal .....	214
1. Scope .....	214
2. Consider Ethical Rules—Especially Around Risk and Reward Sharing .....	215
3. Defuse Emotions Through Careful Dialogue .....	218
4. Document the Agreement .....	219
D. Measure Success and Learn from Each Project .....	219
IV. SMALL FIRMS AND SECONDARY MARKET FIRMS ARE WELL POSITIONED TO CAPTURE THIS OPPORTUNITY .....	221
V. CONCLUSION .....	224

*I’ve looked at life from both sides now,  
From win and lose, and still somehow  
It’s life’s illusions I recall.  
I really don’t know life at all.*

*Joni Mitchell*<sup>1</sup>

1. JONI MITCHELL, *Both Sides Now*, on CLOUDS (Reprise 1969). Lyrics often pop into my mind. Enjoy them. After all, music “soothes the soul.” BOB SEGER, *Old Time Rock and Roll*, on STRANGER IN TOWN (Capitol Records 1979) (“Just take those old records off the shelf; I’ll sit and listen to ‘em by m’self; Today’s music ain’t got the same soul; I like that old time rock ‘n’ roll. . . . Still like that old time rock ‘n’ roll; The kind of music just soothes the soul.”).

Substitute “alternative fees” for “life” in Joni Mitchell’s lyrics and I believe many lawyers would resonate with the sentiment that “I really don’t know alternative fees at all.” Alternative fee structures have become verbal shorthand to describe the many client-reactive tactics that firms use to provide a price for legal services that address clients’ perceived value for those services and perceived or real concerns associated with hourly billing practices. These tactics run the gamut from pure contingency fees to flat fees, capped fees, hybrid fees, and more. But talking about alternatives is not the same as a fully implemented alternative profit-based pricing model.<sup>2</sup>

This article offers a perspective on how to make market pricing a fully implemented business strategy. Appreciating the difference between a strategy on the one hand and implementing tactics on the other is the first and critical step.<sup>3</sup> From a strategic perspective, a firm first needs to understand its vision; second, decide the strategies to achieve the vision; and third, identify and implement the most effective tactics to drive these strategies. Here, a vision or objective for a firm is to continue to survive and thrive in a rapidly evolving legal marketplace—one that is evolving to a “new normal.”<sup>4</sup> One strategy to achieve that objective is to compete for

2. Rachel M. Zahorsky, *Facing the Alternative: Many Pay Lip Service to a Flat Fee System, but How Does It Really Work?*, 98 A.B.A. J. 41, 41–47 (Mar. 2012). There is a decided trend against the use of billable hours for legal services. See, e.g., *Alternative Fee Arrangements*, ALTMAN WEIL, INC., [http://www.altmanweil.com/index.cfm/fa/s.ps\\_detail/oid/57681311-2484-4f37-9fda-2aec560255df/practice\\_service/Alternative\\_Fee\\_Arrangements.cfm](http://www.altmanweil.com/index.cfm/fa/s.ps_detail/oid/57681311-2484-4f37-9fda-2aec560255df/practice_service/Alternative_Fee_Arrangements.cfm) (last visited Sept. 4, 2012) (noting that “pressure for real alternatives to hourly pricing is growing at a dramatic pace”).

3. Your vision is your dream of what you want the organization to be. Your strategy is the large-scale plan you will follow to make the dream happen. Your tactics are the specific actions you will take to follow the plan. Start with the vision and work down to the tactics as you plan for your organization. F. John Reh, *Vision, Strategy, and Tactics*, ABOUT.COM, <http://management.about.com/cs/adminaccounting/a/vst.htm> (last visited Sept. 4, 2012). This is as true for in-house departments as it is for law firms. Alternative fees are a tactic used to achieve some strategic objective—expense reduction or predictability for example. See Roya Behnia, *Alternative Fee Arrangements Are a Tool, Not a Strategy*, A.B.A. J. (March 21, 2012, 8:49 AM), [http://www.abajournal.com/legalrebels/article/alternative\\_fee\\_arrangements\\_are\\_a\\_tool\\_not\\_a\\_strategy/](http://www.abajournal.com/legalrebels/article/alternative_fee_arrangements_are_a_tool_not_a_strategy/).

4. The “new normal” is a phrase used to describe what the legal profession might look like in the not-too-distant future. See, e.g., MITCHELL KOWALSKI, *AVOIDING EXTINCTION: REIMAGINING LEGAL SERVICE FOR THE 21ST CENTURY* *passim* (2012); RICHARD SUSSKIND, *THE END OF LAWYERS?* *passim* (2008); Paul Lippe, *Welcome to ‘The New Normal,’* A.B.A. J. (Oct. 13, 2010, 5:31 PM), [http://www.abajournal.com/legalrebels/article/welcome\\_to\\_the\\_new\\_normal/](http://www.abajournal.com/legalrebels/article/welcome_to_the_new_normal/). Much has been written about the “new normal,” but I am not sure the phrase “new

and win business by selling profitable legal services priced using a market-valued, profit-driven pricing model rather than a hourly rate, cost-plus profit model. Pricing using traditional business tools is one tactic to drive that strategy. More succinctly, one could say it this way: “Help this firm survive and thrive in the new normal through a strategy of ‘market-valued pricing’ by applying traditional business product pricing tools to price our services.”<sup>5</sup> This is a profit-, not revenue-, based business model<sup>6</sup> and a

normal” adequately captures the more immediate future—a future in which I do not think there will be a “norm” so much as a storm of experimentation. It reminds me of the “Forming–Storming–Norming–Performing” model of group development which was first proposed by Bruce Tuckman in 1965. He maintained that each of these phases is inevitable in order for a team to face challenges, tackle problems, find solutions, plan work, and deliver results. *Tuckman’s Stages of Group Development*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Tuckman’s\\_stages\\_of\\_group\\_development](http://en.wikipedia.org/wiki/Tuckman's_stages_of_group_development) (last modified July 17, 2012). I believe the legal profession will be in the “storming” phase for some time before new norms develop.

For a discussion on court citation to Wikipedia, see Joe Pallazolo, *Which Federal Appeals Court Cites Wikipedia Most Often?*, WALL ST. J. L. BLOG (Apr. 23, 2012, 7:35 PM), <http://blogs.wsj.com/law/2012/04/23/which-federal-appeals-court-cites-wikipedia-most/>. If it’s good enough for Judge Posner, then it’s good enough for our purposes. See *infra* notes 8, 10, 50, 106, 108–10, 113, 115, 122, 129, 136, and 151.

5. The Association of Corporate Counsel uses the phrase “value-based fees.” E.g., ASS’N CORP. COUNS., ACC VALUE-BASED FEE PRIMER 3 (2010). To me, that phrase connotes “value line” products and shifts the discussion away from market drivers and “market pricing.” It may be semantics, but focusing on market pricing conceptually allows the notion that a market price might not necessarily be lower than a price derived by hourly billing models. Rather than a firm’s “inventory” only being the hours it has to sell, a firm should think of its inventory as the “value” it has to sell, which should be priced at the market rate for that value. This mindset shift removes a significant constraint.

There are those that believe firms already price at the market:

As for the pricing of legal services, I don’t quite understand the point. Law firms live in a competitive environment, and we price at market . . . . We operate and practice at market prices in a highly competitive environment. With all of those competitive pressures, if a law firm is able to sell its services at X, why should it instead sell them at ½X? . . . . Successful enterprises don’t give away products and services at price points outside the prevailing market. Rather, they . . . figure out their own value proposition as against the competition, and price accordingly.

Rachel M. Zahorsky, *Managing Partner Shares Perspective on the New Normal*, A.B.A.J. (Feb. 22, 2012, 10:14 AM), [http://www.abajournal.com/legalrebels/article/peter\\_kalis\\_an\\_alternate\\_perspective\\_on\\_the\\_new\\_normal/](http://www.abajournal.com/legalrebels/article/peter_kalis_an_alternate_perspective_on_the_new_normal/) (quoting Peter J. Kalis, Chairman and Managing Partner, K&L Gates).

Maybe we are saying the same thing. But the question remains whether hourly billing based on a cost-plus method of pricing best achieves market value in the eyes of the purchaser.

6. This shift from a model based on hours billed (revenue derived from a cost-plus approach) to one that measures success by profit dollars per matter is

significant shift away from hourly billing.

I started my legal career in private practice, and have now returned to it, but I spent the majority of my career in-house, counseling high-growth, entrepreneurial businesses in consumer products markets. My in-house search for better ways to explain to my internal business clients the value and cost of the array of global legal services they required coupled with immersion in a fast-paced, cost-down, price-down, highly competitive market space colors my perspective on market-valued pricing. During that time, I purchased legal services and never billed an hour. Now that I have returned to selling legal services, I again bill for my time and I am on the receiving end of corporate law departments' cost-down initiatives. I truly have looked at fees from "both sides now."

This article provides that "both-sides perspective" on market-valued pricing. Part I summarizes current thinking about the drivers that are causing an evolution—some might prefer revolution<sup>7</sup>—in law firm business models and my perspectives about that change and its velocity. Part II discusses seven non-legal but essential skills successful lawyers will need to capture the opportunity these changes will generate. Those drivers and those skills will enable—even demand—a sharp shift to a profit model and away from an hourly, cost-based billing approach. That shift needs to be accompanied by a disciplined application of traditional business pricing practices to determine profitable, market-valued prices, as discussed in Part III. Finally, Part IV predicts that smaller firms and secondary market firms are uniquely positioned to capture opportunities that arise because of the shift to profit-based

---

now a more frequent subject of legal writing—in the popular press, in the academic world, and even in fiction. See, e.g., BD. OF GOVERNORS' CHALLENGES TO THE PROFESSION COMM., STATE BAR OF WIS., *THE NEW NORMAL: THE CHALLENGES FACING THE LEGAL PROFESSION* 4 (2011), available at <http://www.reinhartlaw.com/Services/BusLaw/CorpGovern/Documents/art1111%20TE.pdf> ("The first step is to understand that lawyers are selling knowledge, not 'legal services' or 'time.'"); KOWALSKI, *supra* note 4, at 7–17; SUSSKIND, *supra* note 4, at 33–36; Lippe, *supra* note 4.

7. THE BEATLES, *Revolution*, on THE BEATLES (Apple 1968) (commonly referred to as the "White Album") ("You say you want a revolution; Well, you know; We all want to change the world; . . . But when you talk about destruction; Don't you know that you can count me out; Don't you know it's gonna be all right; . . .").

pricing models. Unlike those that foresee Armageddon,<sup>8</sup> I see great opportunities for those willing to pursue them.

### I. TIMES ARE CHANGING:<sup>9</sup> WHAT'S HAPPENING?

Much has been written about the monumental changes underway in the legal profession. I focus here on the five drivers that, in my opinion, account for eighty percent of the impetus<sup>10</sup> for change: (1) supply of legal services exceeds demand; (2) the death of the notion that “law is different”; (3) technology and artificial intelligence advances are causing the “deconstruction of legal services” into component parts, each with a different market value; (4) globalization of business is rapidly changing the nature and type of services clients need; and (5) collectively lawyers underestimate the velocity of change which will be championed by the “net generation.”<sup>11</sup>

8. *Armageddon*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Armageddon> (last modified Aug. 24, 2012) (stating that the word is used “in a generic sense to refer to any end of the world scenario”).

9. See generally BOB DYLAN, *The Times They Are a-Changin'*, on *THE TIMES THEY ARE A-CHANGIN'* (Columbia 1964) (“Your old road is rapidly agin’; Please get out of the new one if you can’t lend your hand; For the times they are a-changin’.”).

10. In-house, we learned quickly to apply the Pareto principle to our legal work.

The Pareto principle (also known as the 80-20 rule, the law of the vital few, and the principle of factor sparsity) states that, for many events, roughly 80% of the effects come from 20% of the causes. Business-management consultant Joseph M. Juran suggested the principle and named it after Italian economist Vilfredo Pareto.

*Pareto Principle*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Pareto\\_principle](http://en.wikipedia.org/wiki/Pareto_principle) (last modified Aug. 31, 2012). Using Wikipedia for basic information like this is a great example of the 80-20 rule. For in-house counsel in resource-strapped environments, the notion that 20% of the effort will yield 80% of the results allows a “lighter touch,” lower cost counseling effort for those situations not requiring perfection; it is the enabler of counseling at the “speed of business.”

11. SUSSKIND, *supra* note 4, at 83. Susskind speaks of the net generation as that generation of lawyers who never knew life without the Internet. *Id.* It’s not just that their lives revolve around the Internet, it is that they are fearless adopters of new web-enabled technologies. Left to their own devices, and if their parents’ generation either retires or gets out of their way, they will first go to the web for a solution to their immediate issue. If the answer is “good enough” for their purposes, they well may stop there. The net generation is the future chairs of our marketing and finance committees, the next generation of managing partners, and yes, our current and future clients. See ALM LEGAL INTELLIGENCE, *SPEAKING DIFFERENT LANGUAGES: ALTERNATIVE FEE ARRANGEMENTS FOR LAW FIRMS AND LEGAL DEPARTMENTS 7* (2012), available at <http://www.milesstockbridge.com/pdf/publications/2012%20Speaking%20Different%20Languages%20AFA%20Report.pdf> (“[S]ome in-depth interviews suggest that both law firms and legal

A. *Power to the Purchaser:*<sup>12</sup> *Supply Exceeds Demand*

Tell a newly minted lawyer that supply does not exceed demand for legal services and they will wonder where you've been lately—certainly, not online.<sup>13</sup> The recent recession brought this supply surplus into sharp focus.<sup>14</sup> With oversupply comes a decided shift in purchasing power. Today, a few hundred general counsel and their staffs control the purchase of the majority of legal services and, sensibly, they are using overcapacity in the market to drive down overall costs to their companies.<sup>15</sup> They are

---

departments face a generational challenge. We hear that younger attorneys at law firms and legal departments are more willing to employ AFAs than their older peers.”).

12. See generally JOHN LENNON/PLASTIC ONO BAND, *Power to the People* (Ascot 1971).

13. The blogosphere is full of law students, law schools, and commentators talking about the challenges of finding a job and criticizing their law schools for allegedly overselling their students' post-law school employment rates, layoffs, firm implosions, etc. See, e.g., Elizabeth Chambliss, *Two Questions for Law Schools about the Future Boundaries of the Legal Profession*, 36 J. LEGAL PROF. 329, 332 (2012) (noting a lack of collective strategic vision among law schools on rethinking the functional and regulatory boundaries of the profession and to help shape the future of the legal industry); Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J. L. BLOG (June 25, 2012, 10:18 AM), <http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html> (reporting that new data released by the ABA suggests that “the job market for law grads is worse than previously thought”); Press Release, Nat'l Ass'n for Law Placement, Inc., Median Private Practice Starting Salaries for the Class of 2011 Plunge as Private Practice Jobs Continue to Erode (July 12, 2012), available at [http://www.nalp.org/uploads/PressReleases/Classof2011Salary\\_PressRel.pdf](http://www.nalp.org/uploads/PressReleases/Classof2011Salary_PressRel.pdf) (reporting that starting salaries for law school graduates have plunged from 2010 to 2011 due to fewer big firm jobs and proportionally more jobs with lower paying smaller firms). The most enjoyable this year was a recent commentary based on Michigan Law's report that one of its graduates is now a “sheep farmer.” Michigan: “The Most Honest” Law School, SBM BLOG (Apr. 22, 2012, 1:00 PM), <http://sbmblog.typepad.com/sbm-blog/2012/04/michigan-the-most-honest-law-school.html>.

14. See Chambliss, *supra* note 13, at 329 & n.1. From November 2008 to December 2009, the legal services industry lost 42,000 jobs. *Id.* The oversupply was not evenly spread across the country; for example, in 2009 New York alone was estimated to have a surplus of 7687 lawyers, twenty-eight percent of the national surplus. *Id.* at 330 & nn.7–8.

15. William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 381 (2011). Henderson argues that “existing hierarchies of legal employers . . . are vulnerable.” *Id.* at 374. At the turn of the last century, “the great industrialists and financiers were building empires . . . , federal and state governments were beginning to grapple with the need for regulation in order to curb some of the unwanted or unintended consequences of the modern industrial state,” and “the typical lawyer . . . possessed only the skills of the generalist.” *Id.* Post-World War II, the U.S. economy was booming and “clients were facing novel legal problems brought about by the scale



sophisticated corporate counsel looking for methods of workplace organization and process that will deliver higher quality legal inputs and outputs (a bundle of both services and products) for a predictable fee. Further, as the [change] . . . gains momentum, the legal service market will begin to behave like other sectors of the economy—the cost of these inputs and outputs will decline over time.<sup>16</sup>

This period of excess supply will lead to disruptive changes driven by innovation in technology, project management, and process improvements.<sup>17</sup> And most analysts conclude that these changes are here to stay. There will be no turning back.<sup>18</sup>

Further, law firms now compete more directly against in-house resources. In the past five years, both the use of in-house counsel and the pay they receive is steadily increasing. In-house attorneys seek outside assistance less often. This data signals a power shift from law firms to in-house resources as in-house counsel take on work as a way to reduce legal spending.<sup>19</sup> During my time in-house, we constantly debated and financially analyzed whether the

---

and breadth of business operations, the need for new methods of finance, and the proliferation of state and federal regulations.” *Id.* at 378. These circumstances spawned the age of the legal specialist. *See id.* “With the rise of the general counsel position in the 1970s, in-house lawyers” supplanted law firm senior partners as the “trusted advisors to the company’s owners or senior executives.” *Id.* at 379. General counsel adopted the practice of hiring individual specialists rather than firms. *Id.* at 380. Specialists proliferated as new specialists were trained, and “[t]he relative supply of sophisticated business lawyers . . . increased relative to demand, thanks to the growth of large law firms and the training they provided over a period of several decades.” *Id.* at 381.

16. *Id.* at 381.

17. *Id.* at 382.

18. Chambliss, *supra* note 13, at 331.

19. *See, e.g.*, Press Release, Ass’n Corp. Couns., Chief Legal Officers Increase Use of Value-Based Fee Arrangements, Expand Globally & Express Satisfaction with Career Choice (Oct. 24, 2011), *available at* [http://www.acc.com/aboutacc/newsroom/pressreleases/upload/ACC-CLO-Survey-Release\\_clean-final.pdf](http://www.acc.com/aboutacc/newsroom/pressreleases/upload/ACC-CLO-Survey-Release_clean-final.pdf) (summarizing the Association of Corporate Counsel’s (ACC) 2011 CLO Survey which noted the need to “reduc[e] outside legal costs”). The ACC survey reports that only 20% of in-house counsel sought outside counsel support for tax issues, down from 30% in 2006; 28% used outside counsel for mergers and acquisitions, down from 35% in 2006; and 65% used outside counsel for litigation, down from 69% in 2006. *Id.* Thirty-eight percent of respondents said they would increase their number of in-house counsel in 2012, slightly down from 41.4% in 2011, but still significantly up historically. *Id.* Most significantly, only 14.5% reported they would increase their use of outside counsel in 2012, with 45% indicating they would maintain current levels. *Id.* This means that 40.5% must be planning to reduce outside counsel spending. *See id.*

company was better off hiring or buying a skill set. Clearly, companies engage in these “make or buy” decisions daily.<sup>20</sup>

Some of this shift is driven by dissatisfaction with hourly-based billing practices. Arguably, the billable-hour model incentivizes inefficiency, devalues experience, discourages use of time-saving technologies, breeds mistrust, leads to retentions focused on discrete matters, sets up roadblocks to proactive counseling, and makes team work difficult.<sup>21</sup> A discussion among current and former general counsels brought this point home to me. At a recent breakfast, I raised this subject and tried to make the point that a few lawyers that inappropriately pad bills should not negatively reflect on all the others in the profession that meticulously track their time and regularly write down time in order to ensure their bills are fair. Try as I might, I could not move the conversation away from spirited retellings of horror stories

---

20. The “make or buy” question represents a fundamental dilemma faced by many companies. Today’s global competition forces manufacturing companies to re-evaluate their existing processes, technologies, manufactured parts and services in order to focus on strategic activities. However, companies have finite resources and may not be able to afford to have all activities in-house. This has resulted in an increasing awareness of the importance of the make-or-buy decision, the dilemma organizations face when deciding between keeping technologies or processes in-house, or purchasing them from an outside supplier. The ability to make such decisions in a structured and rational manner is likely to improve a company’s overall performance. *Industrial Make-or-Buy Decisions*, U. OF CAMBRIDGE INST. FOR MFG., <http://www2.ifm.eng.cam.ac.uk/csp/projects/mvb.html> (last visited Aug. 28, 2012); see also *Make-or-Buy Decisions*, ENOTES, <http://www.enotes.com/make-buy-decisions-reference/make-buy-decisions> (last visited Aug. 28, 2012). See generally *Make-or-Buy Decision*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/make-or-buy-decision.asp#axzz1tjC2Cqwr> (last visited Aug. 28, 2012).

You may have noticed by this point that I am using web-based resources to elaborate on many of the business tools I recommend attorneys adopt. This is not by accident. I do it to demonstrate the amount and quality of what is available online, free for the asking, in areas that routinely support highly paid consulting work. After all, who would buy the book or hire the consultant if you can have a Cambridge study on how to make a “make-or-buy decision” free for the asking? Some will, of course, but others will conclude, as I have here, that the free information is “good enough” for the purpose at hand.

21. See, e.g., ALM LEGAL INTELLIGENCE, *supra* note 11, at 11; Fred Bartlit, *The Competitive Analysis Underlying Bartlit Beck*, A.B.A. J. (May 30, 2012, 11:30 AM), [http://www.abajournal.com/legalrebels/article/the\\_competitive\\_analysis\\_underlying\\_bartlit\\_beck](http://www.abajournal.com/legalrebels/article/the_competitive_analysis_underlying_bartlit_beck) (arguing that the billable hour devalues experience, discourages use of time-saving technology, and results in inefficient firms being more profitable than efficient firms); Ellen Rosenthal, Chief Counsel, Pfizer Legal Alliance, *An Overview of the PLA*, 16 (Oct. 28, 2011), [http://collegeoflpm.org/wp-content/uploads/2012/01/2011\\_Defining-Value.LawPractice-Oct-28-Price-Intro-rws-ellen-final.pdf](http://collegeoflpm.org/wp-content/uploads/2012/01/2011_Defining-Value.LawPractice-Oct-28-Price-Intro-rws-ellen-final.pdf).

about how some lawyer took advantage. Every in-house lawyer has their war stories. Those perceptions—true or not—are a significant reason why firms are fired or not retained again.<sup>22</sup> Especially with supply exceeding demand, this perception of abuse is now reality and has become a primary emotional driver behind the movement to kill the billable hour.

Law firms and law schools get the message.<sup>23</sup> Firms understand that hiring and pricing leverage is in the hands of a few key purchasers. Law schools are changing curriculum in response.<sup>24</sup> More than 90% of law firms report that price competition is here to stay, and 80% say that non-hourly billing approaches also are here to stay (this is up from 50% in 2009).<sup>25</sup> At the same time, firms report they are less confident about being able to meet these new demands and maintain profitability.<sup>26</sup> Their focus is on efficiency,

22. I always explained to outside counsel that if I believed that billing practices were out of line, I might choose to avoid an argument, but I would not pick up the phone again. Apparently, others see it similarly. *See, e.g.,* Meredith Hobbs, *Why Do General Counsel Fire Law Firms?*, LAW.COM (June 1, 2012), [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202552861622&Why\\_Do\\_General\\_Counsel\\_Fire\\_Law\\_Firms](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202552861622&Why_Do_General_Counsel_Fire_Law_Firms). Now that I am on the other side, I hope that my clients would call first so that we could work out any issues and make sure all of the appropriate facts were on the table.

23. *See, e.g.,* Ctr. For Career Strategy & Advancement, *Market Trends*, NORTHWESTERN LAW, <http://www.law.northwestern.edu/career/marketrends/> (last updated Mar., 2012) (reporting the following trends for 2011: a year of only 1% growth; below-pre-recession levels of hiring; historic lows for realized rates, resulting in more focus on lateral hires with books of business; and firm overhead grew at a rate higher than revenues, resulting in decreased productivity and profitability). *See also* Chambliss, *supra* note 13, at 331–32; Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?*, 36 J. LEGAL PROF. 301, 309–12 (2012) (discussing the economics of obtaining a law degree and the prospects for post-graduation employment given the current turmoil in today's legal marketplace).

24. A new ABA survey scheduled for release in advance of the ABA's August 4, 2012, annual meeting reveals "a renewed commitment by law schools to review and revise their curricula to produce practice-ready professionals." Mark Hansen, *US Law Schools Expanding Clinical, Professionalism Offerings, Survey Shows*, A.B.A. J. (July 5, 2012, 11:20 AM), <http://www.abajournal.com/news/article/us-law-schools-expanding-clinical-professionalism-offerings-survey-shows/> (quoting Hulett Askew, ABA consultant on legal education).

25. THOMAS S. CLAY & ERIC A. SEEGER, ALTMAN WEIL, INC., *LAW FIRMS IN TRANSITION* 1, 5 (2011), available at [http://www.altmanweil.com/dir\\_docs/resource/88adb851-ba55-4cce-9d97-fa06607c75bb\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/88adb851-ba55-4cce-9d97-fa06607c75bb_document.pdf); *see also* Sindhu Sundar, *Firms Predict Price Wars, Alternative Billing Here to Stay*, LAW360 (May 17, 2012, 5:06 PM), <http://www.law360.com/legalindustry/articles/341598/firms-predict-price-wars-alternative-billing-here-to-stay>.

26. CLAY & SEEGER, *supra* note 25, at 6; *see also* Shannon Henson, *Law Firms Say Alternative Billing Won't Dent Profits*, LAW360 (June 22, 2010, 5:54 PM),

productivity, and cost control as a means to stay competitive *and* profitable.<sup>27</sup> When supply exceeds demand, competition increases and prices decrease, creating an environment in which law departments are enabled to seek the same outcome any company wants from any service provider: the *best value* for the service delivered, as measured by price, quality, and service. And they will leverage their purchasing power to get it. What has changed is not that desire, but this shift in purchasing power combined with changes in the roles and business skills of in-house counsel.

*B. That Law is Different has "Disappeared Completely"*<sup>28</sup>

The notion that somehow "law is different" is dead. While *lawyers* do have unique skills and significant professional and ethical requirements,<sup>29</sup> the *legal industry* is subject to the same economic forces as any other industry. Today's general counsel or chief legal officer is a business executive on equal footing with other executives in his or her company. The days of a reactive legal

---

<http://www.law360.com/legalindustry/articles/176627/law-firms-say-alternative-billing-won-t-dent-profits>. Even though firms expressed concerns about profitability, only one in four reported that profits per partner will decline. Sundar, *supra* note 25. To maintain partner profits, yet compete more aggressively on price for the work that is available, the remaining seventy-five percent of firms appear to be maintaining profits by cutting legal staff, with firms reporting fewer equity partners and smaller associate classes. *See id.* Ironically, this is happening at the same time that firms express concern about planning for the imminent loss of retiring baby-boom partners. *See, e.g.,* CLAY & SEEGER, *supra* note 25, at 9, 40.

27. CLAY & SEEGER, *supra* note 25, at 4–5, 10.

28. *See generally* RADIOHEAD, *How to Disappear Completely*, on KID A (Parlophone 2000).

29. Attorneys have a fiduciary duty to their clients. The Model Rules of Professional Conduct establish standards of conduct and care that together place the attorney in a fiduciary relationship with the client. *See* MODEL RULES OF PROF'L CONDUCT Rs. 1.4 (1983) (requiring a lawyer to reasonably consult with clients regarding decisions, inform clients of relevant matters, and comply with reasonable requests for information), 1.6 (stating that a lawyer has a duty to maintain confidentiality of client information), 1.7 (addressing how lawyers shall handle conflicts of interest), 1.8 (addressing how lawyers shall handle conflicts of interest), 1.9 (listing duties to former clients), 1.15 (stating a lawyer acts as a fiduciary with respect to any client funds entrusted to the lawyer), 1.18 (listing duties to potential clients), 2.1 ("[A] lawyer shall exercise independent professional judgment and render candid legal advice"). The New York Court of Appeals has explained that "[t]he duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's." *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994).

department limited to core legal tasks, such as managing outside counsel, responding to business requests for counseling, and preparing contracts and board materials, are long gone.<sup>30</sup> Today's legal department does all that and much, much more. Chief legal officers are extraordinary risk managers and manage those risks with the intent to advance their company's business strategies.<sup>31</sup> They are much more global in their thinking, and their leadership roles extend well beyond the legal department.<sup>32</sup> They need to be creative,<sup>33</sup> strategic,<sup>34</sup> decisive,<sup>34</sup> and, above all, business-minded.

30. In a recent report by Russell Reynolds Associates, the author concluded that "[t]he role of the legal executive has changed dramatically over the last decade." CYNTHIA DOW, RUSSELL REYNOLDS ASSOCIATES, BECOMING THE CALM RISK TAKER: ATTRIBUTES FOR SUCCESS IN TODAY'S NEW LEGAL ENVIRONMENT 1 (2012), [http://www.russellreynolds.com/sites/default/files/becoming\\_the\\_calm\\_risk\\_taker.pdf](http://www.russellreynolds.com/sites/default/files/becoming_the_calm_risk_taker.pdf); see also Julie McMahon, *Trying Novel Approaches to Create In-House Value*, LAW.COM (July 13, 2012), <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202562797775> ("Law is a business. That's the gospel according to the in-house law departments and firms that were recognized as 'Value Champions' by the Association of Corporate Counsel."). D. Cameron Findlay, Senior Vice President, General Counsel and Secretary at Medtronic, "emphasized the need for lawyers to look at themselves as a business function." McMahon, *supra*. "Businesspeople . . . like to see other people and business functions act as businesspeople . . . [T]hey like the fact that we're aligning the interests of the outside law firms with the interests of the corporation." *Id.* (quotation marks omitted).

31. See, e.g., Craig Bleifer, *10 Questions CEOs Should Ask GCs About the Legal Business Plan*, LAW.COM (June 18, 2012), [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202559687630&10\\_Questions\\_CEOs\\_Should\\_Ask\\_GC\\_About\\_the\\_Legal\\_Business\\_Plan](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202559687630&10_Questions_CEOs_Should_Ask_GC_About_the_Legal_Business_Plan). Among the ten questions are these: What is the return on investment ("ROI"), will our risk profile be improved, what is the value-add, will efficiency be improved, will quality be improved, how will success be measured? *Id.* And Bleifer adds that the "legal business plan should be integrated into the company's long- and short-term planning process[es]." *Id.* Bleifer is the Vice President and General Counsel of Daiichi Sankyo, Inc., the U.S. subsidiary of Daiichi Sankyo. *Id.* How many lawyers in firms think about the return on investment of legal matters, much less how to calculate it?

32. Russell Reynolds Associates found that "the average legal executive is on par with his or her peers on most [executive] attributes such as being decisive, setting strategy, executing for results, leading teams, building relationships and using influence, learning and thinking and motivating." DOW, *supra* note 30, at 2.

33. Russell Reynolds Associates terms this creativity element "mischievousness." *Id.* The study also found that these legal executives were almost as likely to take risks as their typical business counterparts. *Id.* It identified the following eight attributes exhibited by successful legal executives: socially bold, persuasive, socially confident, competitive, achieving, decisive, not easily excited, and mischievous. *Id.*; see also Shannon Green, *The 8 Characteristics of Successful GCs and CLOs*, LAW.COM (June 6, 2012) [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202557454809&The\\_8\\_Characteristics\\_of\\_Successful\\_GC\\_and\\_CLOs](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202557454809&The_8_Characteristics_of_Successful_GC_and_CLOs) (reporting on the Russell Reynolds study).

As lawyers take on executive roles, those roles come with the same expectations placed on all other executives, including managing budgets and driving cost control and other business initiatives into their departments. Daily, these legal executives are exposed to the latest innovations in corporate management, and they are expected, *and excited*, to implement those initiatives in their operations. I recall one incident from my in-house days when a colleague found himself by chance in the elevator with the new CEO, who promptly asked the lawyer to recite the CEO's top five initiatives. The lesson in this story is that no in-house lawyer can afford to be disengaged from the business initiatives underway in his or her company. Further, if legal executives expect support for their initiatives from other executives, they need to reciprocate and support those executives' initiatives—whether they come from the business or other staff groups such as audit, finance, human resources, or, yes, purchasing.

No wonder, then, that these creative, highly performing legal executives have turned their attention to innovative ways to manage their outside legal spending. They now use standard purchasing tools and strategies for the procurement of legal services. As lawyers, we may not be just “any” vendor, but we will increasingly be subject to “vendor management tools,” including the corporate programs du jour<sup>35</sup>—six sigma projects, reverse auctions, requests for proposal or quotes, volume discounts, proscribed technology policies, billing restrictions, mandatory budgets, project management tools—the list being limited only by what sometimes seems the mischievous<sup>36</sup> creativity of the client and the company's purchasing department. In-house, I applauded these experiments, knowing that, with trial and error, we would find workable solutions for reducing and managing legal spend.<sup>37</sup>

What I may not have fully appreciated then was the impact on individual law firm efficiency of being on the receiving end of and managing dozens of different client programs, billing systems, and rules. For example, even in a small firm of about twenty-five lawyers, our billing team of one manages over fifty sets of billing rules and inputs into more than a half-dozen separate billing

---

34. DOW, *supra* note 30, at 2.

35. *See infra* Part II.A.

36. *See supra* note 33 and accompanying text.

37. “Legal spend” is part of the jargon—the noun that describes the totality legal spending.

technologies. Some convergence in the legal industry would avoid suboptimization and create system efficiencies.<sup>38</sup>

Change does not happen overnight, and firms and legal departments continue to experiment. Individuals find themselves at different places on the change continuum. Even some general counsel may not be enthusiastic about moving away from hourly rates.<sup>39</sup> They worry that firms will make up the difference in some less transparent way—by using less experienced people which might reduce quality, for example. Some general counsel want to avoid “emotional discussion[s] about value” and others find that it is difficult to compare offers from competing firms other than on an hourly-rate basis.<sup>40</sup> Purchasing departments, which know how to measure unit costs, may not feel competent to measure the performance of a more innovative solution and may resist change.

There are also forces within firms that make moving to a non-hourly, profit-based model challenging, including that firms need to learn to measure lawyer contributions other than by hours billed. This is much harder than it seems. The value the lawyer provides for the client is the solution or outcome they help the client achieve. How should this be measured? While the monetary value the lawyer provides to the firm can be measured in terms of profitability, profitability cannot be the sole measure out of concern that quality will suffer or other unintended consequences will surface.<sup>41</sup> Firms need to develop methods of evaluation that assess competency, efficiency, problem-solving abilities, and

38. Businesses are well attuned to the concept of suboptimization—the notion that optimizing each component part of a system without primary focus on the whole of the system runs the risk of creating an even more inefficient overall system. *Suboptimization*, THE FREE DICTIONARY, <http://encyclopedia2.thefreedictionary.com/suboptimization> (last visited Sept. 1, 2012). I believe that is the case with today’s complex array of billing systems, company specific rules, and approval processes. I also believe that these inefficiencies arise directly from lack of trust between the parties arising out of hourly rate billing practices. Change the latter and the former inefficiencies will dissipate.

39. Not all general counsel want to change, and many firms get mixed signals. See, e.g., Anne Urda, *General Counsel Keep Billable Hour Hanging On*, LAW360 (Nov. 6, 2009, 6:43 PM), <http://www.law360.com/ip/articles/122992> (“The notion that general counsel really want to see the billable hour become extinct remains in doubt” for some, complicating the landscape for firms trying “to please this all-important constituency.”). See also ALM LEGAL INTELLIGENCE, *supra* note 11, at 14.

40. Urda, *supra* note 39.

41. Six sigma methodologies warn of the unintended consequence of a process change. See, e.g., *Unintended Consequences*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/unintended-consequences.html> (last visited Sept. 1, 2012).

profitability.<sup>42</sup> Just as measurement systems based almost exclusively on billable hours have caused unsatisfactory behaviors, new measurement systems will run the risk of creating unintended incentives that hindsight will label perverse.<sup>43</sup> My business clients used to joke, “Be careful what you measure, you just might get it!” Business understands well that measurement systems create strong incentives and manage with this axiom in mind. Law departments and firms will need to do the same.

Regardless of mixed signals, the trend is clear. The number of legal departments reporting that they spend more than 10% of total fees on non-hourly arrangements increased from 27% to 43% between 2008 and 2009.<sup>44</sup> In the same survey, about two-thirds of surveyed chief legal officers reported putting increasing pressure on law firms to change their value propositions rather than just cut costs.<sup>45</sup> Importantly for firms, three-quarters of those same chief legal officers expressed skepticism that law firms were serious about changing.<sup>46</sup> “Either many law firms just don’t understand that clients today expect greater value and predictability in staffing and pricing legal work, or firms are failing to adequately communicate their understanding and willingness to make real change. In either case, it’s a big problem.”<sup>47</sup>

Finally, it bears considering that the chief legal officers of tomorrow are today’s junior and senior in-house lawyers and firms’

42. See Susan Hackett, *The “Slow-Motion Riot”: Moving Toward Better Valuation of Lawyer Services*, ASS’N CORP. COUNS., 6 (Fall 2009), <http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=777723&title=ACC%20Overview%20of%20Value-Based%20Fees%20and%20Staffing>.

43. The billable-hour concept itself arose, in part, out of a desire to determine whether retainers, then a common way of charging for legal services, provided appropriate value to the client. See Daniel Lee Jacobson, *The Hours: Is the Billable Hour Running Out of Time?* CAL. LAW. (Apr. 2006), <http://www.callawyer.com/Clstory.cfm?eid=821932>. The solution to one problem created another set of problems. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 8 (1991) (discussing how hourly billing was implemented so clients could better assess the value of services they received.).

44. Shannon Henson, *Firms Resist Changing Delivery Models: CLO Survey*, LAW360 (June 30, 2009, 12:00 AM), <http://www.law360.com/topnews/articles/108976/firms-resist-changing-delivery-models-closurvey>.

45. *Id.*

46. *Id.* Twenty-five percent of CLOs reported the pressure was “high” while 37% said the pressure was “mid-range,” and 38% reported that it was “low.” Few CLOs said law firms were highly serious about change: 20% noted some demonstrable effort, and 75% said firms had “little or no interest in change.” *Id.*

47. *Id.*



associates and junior partners.<sup>48</sup> They are technologically savvy. They are masters of social media, web-based sharing, and consumers of free content. They are fearless adopters of new technology and will demand that law firms adapt. They will lead that change.

In sum, today's legal executives employ the same business tactics as all other business executives. As vendors, law firms are now subject to those business tactics. The legal industry is not economically different from any other so, collectively, we need to "get over it,"<sup>49</sup> and embrace this new business culture both in terms of how we provide value and in terms of how we measure performance. In my judgment, it is a better business strategy to lead rather than to follow a trend; savvy firms will seek first-mover advantage.<sup>50</sup> This is especially true as it relates to the use of efficiency enabling tools—the new technology transformers—discussed next.

C. *The Technology Transformers: Knowledge Management Systems, Artificial Intelligence, and Document Management Technologies*

Supply exceeds demand. Legal executives are deploying all available business tools to maximize quality and service, and minimize cost. It is a combustible mix. Adding fuel to the fire, rapid advances in knowledge management tools, artificial intelligence, and document review technologies are driving "deconstruction" of legal services into its component parts, resulting in each component reflecting a separate market value and triggering a separate "make or buy" decision both for law departments and law firms.

High-value work, like advocacy, analysis, and counseling, requires skill, expertise, experience, judgment, and knowledge of the client. Lower-value work consists of more commodity-like tasks;

48. See Catherine Dunn, *The Millennials Are Coming, and Boards Need to Get Ready*, LAW.COM (May 3, 2012), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202551038489>.

49. See generally OK Go, *Get Over It, on OK Go* (Capitol Records 2002) ("Hey! Get, get, get, get, get over it!").

50. See generally *First-Mover Advantage*, WIKIPEDIA, [http://en.wikipedia.org/wiki/First-mover\\_advantage](http://en.wikipedia.org/wiki/First-mover_advantage) (last updated Aug. 7, 2012) ("In marketing, first-mover advantage is the advantage gained by the initial ('first-moving') significant occupant of a market segment . . . . Sometimes the first mover is not able to capitalize on its advantage, leaving the opportunity for another firm to gain second-mover advantage.").

some examples might be document review in due diligence, document drafting, research, and litigation document management and review.<sup>51</sup> And, increasingly, lawyers need not necessarily be the supplier of choice for every component part, particularly routine document review and production work.<sup>52</sup> The incursion into traditional legal process and content services by accounting firms, on-line legal services providers, e-discovery firms, litigation management services, knowledge management companies, security and investigative firms, foreign lawyers, and others continue.<sup>53</sup> It is now big business.<sup>54</sup> And the next intruders are chain stores.<sup>55</sup> Really.

51. Jeffrey Carr, the former General Counsel of FMC Technologies, is a thought leader in this regard. He suggests lawyers do four things: (1) represent the client's interests through advocacy, (2) provide advice to and counsel clients regarding proposed activities, (3) provide substantive content, and (4) process information to create legal work product (for example, generate contracts or engage in discovery related work). Paul Lippe, *The \$60-Per-Hour Lawyer—Why Dewey Isn't Ab-normal*, A.B.A. J. (Mar. 28, 2012, 8:05 AM), [http://www.abajournal.com/legalrebels/article/the\\_60\\_hour\\_lawyer-why\\_dewey\\_isnt\\_ab-normal/](http://www.abajournal.com/legalrebels/article/the_60_hour_lawyer-why_dewey_isnt_ab-normal/). Of these, the first two are highly valued and are, for now, the only activities still reserved exclusively to lawyers; the second two carry a lower market value (which is not to imply they have no value or that the tasks are unimportant).

52. See, e.g., David A. Steiger, *The Rise of Global Legal Sourcing: How Vendors and Clients Are Changing Legal Business Models*, 19 BUS. L. TODAY 39, 39, 42 (Nov./Dec. 2009) ("A growing chorus argues that there is nothing inherent in the tasks involved in that work [(for example, large-scale document reviews)] that require a licensed attorney to do them" and "[w]hen a client can choose to have a first-cut document review done by associates billed out at nearly \$300 per hour, or at \$60 per hour via a legal sourcing firm with no loss of quality, what client won't insist on realizing the cost savings?").

53. Chambliss, *supra* note 13, at 330 ("China, India, e-discovery, legal process outsourcing: U.S. law firms are being besieged by foreign and non-legal competitors and (seemingly) suddenly thousands of U.S. law graduates have nowhere to go.").

54. In May 2012, Gartner, a technology research firm, concluded that in combination, twenty-one e-discovery companies (those that met their requirements for inclusion in its report) surpassed \$1 billion in revenues in 2010. See Evan Koblentz, *Gartner: Top E-discovery Vendors Eclipse \$1B in 2010 Revenue*, LAW TECH. NEWS (May 25, 2012), [http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202555971820&Gartner\\_Top\\_EDiscovery\\_Vendors\\_Eclipse\\_1B\\_in\\_2010\\_Revenue&slreturn=20120804233417](http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202555971820&Gartner_Top_EDiscovery_Vendors_Eclipse_1B_in_2010_Revenue&slreturn=20120804233417). One assumes a further significant increase between 2010 and 2012. Some estimate the market for legal services to be about \$160 billion, so \$1 billion does not represent the extinction of law as we know it; nevertheless, who would scoff at a \$1 billion opportunity? See Lippe, *supra* note 51.

55. The U.K. Legal Services Act, often dubbed the "Tesco Law" will allow non-lawyers to invest in and own legal businesses. See *'Tesco Law' Allows Legal Services in Supermarkets*, BBC NEWS UK (Mar. 28, 2012, 9:29 AM), <http://>

While many agree that advocacy will remain mostly with law firms, counseling is perfectly suited to increasingly move in-house because it thrives on a deeper understanding of the client and its employees than most firms can offer; content will be outsourced, given away, or embedded in knowledge management tools; and process work will grow, but be increasingly outsourced, and its role as a profit center greatly diminished.<sup>56</sup> This is our future.

---

[www.bbc.co.uk/news/uk-17538006](http://www.bbc.co.uk/news/uk-17538006). High Street retailers and even retail chains such as Tesco will be able to offer legal services along with their traditional fare. *See id.* “Thousands of high street solicitors could go to the wall in a ‘seismic’ upheaval of Britain’s 14 billion consumer legal market . . . . [T]he market for retail legal work, such as conveyancing and wills, will be dominated by a handful of multibillion-pound providers within a few years.” Alex Spence, *Perfect Storm ‘Spells the End for Thousands of Solicitors’* (Oct. 10, 2011), <http://www.ytlcommunity.com/commnews/shownews.asp?newsid=59055&category=featured>. Having lived in the United Kingdom and shopped weekly at Tesco, with its multitude of check-out lanes and a little of everything on offer, it is easy for me to imagine someone taking their newly drafted will through one of those lanes and being efficiently and cost-effectively on their way.

The position is different in the United States. Currently, Rule 5.4(d) of the *ABA Model Rules of Professional Conduct* prohibits lawyers from practicing in entities authorized to practice law for a profit if a non-lawyer owns any interest in the entity, is a corporate officer or director of the entity, or has the right to direct or control the professional judgment of a lawyer. *See* Erin J. Cox, *An Economic Crisis Is a Terrible Thing to Waste: Reforming the Business of Law for a Sustainable and Competitive Future*, 57 UCLA L. REV. 511, 526 (2009).

As recently as this past April, the ABA rejected non-lawyer ownership interests in law firms. *See* Sindu Sundar, *Nonlawyer-Owned Discovery Cos. Can’t Practice Law: DC Bar*, LAW360 (July 11, 2012), [http://www.law360.com/internationaltrade/articles/359193?nl\\_pk=07572540-4f32-4f0a-ac9b2a430b9d9fa&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=internationaltrad](http://www.law360.com/internationaltrade/articles/359193?nl_pk=07572540-4f32-4f0a-ac9b2a430b9d9fa&utm_source=newsletter&utm_medium=email&utm_campaign=internationaltrad) (discussing a ruling of the D.C. Bar and referencing the most recent ABA positions). Calls for deregulation of U.S. law practice traditionally arose out of concern that the middle and lower classes are being priced out of the market for legal services. Increasingly, however, the call is being made by corporations out of concern for global competitiveness, arguing that regulatory constraints create “barrier[s] to innovation.” *See* Chambliss, *supra* note 13, at 340 (alteration in original) (citation omitted); *see also infra* Part I.D. (cross-border practice issues).

Regardless of the formality of rules changes, de facto deregulation is underway. Thousands of lawyers work in accounting and consulting firms. Corporate counsel increasingly work outside the state(s) in which they are licensed. Corporations increasingly rely on non-lawyer employees for law-related work. LawPivot recently received an investment from non-lawyer investors. *See* Chambliss, *supra* note 13, at 342 & n.81 (footnotes omitted). Non-lawyer investments in other consumer-directed online services cannot be far behind.

56. Lippe, *supra* note 51; *see also* SUSSKIND, *supra* note 4, at 93.

### 1. *Knowledge Management*

As a child, I remember sitting with an encyclopedia on my lap, traveling the world in my mind. It was part of a life-long love affair with books and travel. Encyclopaedia Britannica's story provides interesting insights into today's world of knowledge management.<sup>57</sup> Its traditional offering consisted of thirty-two volumes of 1000 pages each, bound in leather and finished in a first-class manner, each set selling for about \$1500 through a direct sales force. Somehow, even though I did not always have new shoes, my parents—like many others—managed to buy a set of encyclopedias. In 1989, seeing the writing on the wall, Encyclopaedia Britannica was the first to launch an encyclopedia on CD-ROM. But by the 1990's Microsoft was offering a free competitive encyclopedia.<sup>58</sup> Today, who even remembers Microsoft's encyclopedia? The net generation expects to find encyclopedia-type information free on the Internet through sources such as Wikipedia.<sup>59</sup>

The trend in the legal profession is the same. I started practicing law when printed, bound volumes lined library shelves and staff spent hours inserting updates into pockets provided on the inside back cover. Today, law firms discuss whether space even

57. Catherine Dunn, *Encyclopaedia Britannica GC on Knowledge Going Digital*, LAW.COM (May 2, 2012), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202550864514>.

58. Encyclopaedia Britannica's General Counsel, William Bowe, made another interesting point in his interview: "What surprised me, as the digital age began to unfold further in the 90s, was the trademark infringement. . . . Now, as we publish a whole variety of e-books, we're seeing those get picked up and illegally distributed whole on the Internet." *Id.* Related to this is the recent press regarding the sale on Amazon.com of self-published books with—arguably deceptively—similar titles and authors as bestsellers. *See, e.g.*, Stephen Gandel, *Amazon's Knock-off Problem (35 Shades of Grey, Anyone?)* (Apr. 16, 2012), <http://tech.fortune.cnn.com/2012/04/16/amazon-knock-off-bestsellers/>. How long before we see pirated law firm knowledge management databases appearing on the Internet attached to names that evoke the names of recognized law firms? Already, unscrupulous entities are engaging in the equivalent of trade name misappropriation by use of websites with names almost identical to those of brand name firms. *See, e.g.*, Martha Neil, *Law Firms Sues Over Doppelganger Domain Name, Says Infringing Website Is Intercepting Attorney Email*, A.B.A. J. (June 25, 2012), [http://www.abajournal.com/mobile/article/law\\_firm\\_sues\\_over\\_doppelganger\\_domain\\_name\\_says\\_twin\\_website\\_is\\_intercepti/](http://www.abajournal.com/mobile/article/law_firm_sues_over_doppelganger_domain_name_says_twin_website_is_intercepti/).

59. *See* Virginia Grant & Marci M. Krufka, *The Young and the Restless: Understanding Generational Differences in Today's Law Firms*, in ALTMAN WEIL, INC., REPORT TO LEGAL MANAGEMENT 3 (2003), available at [http://www.altmanweil.com/dir\\_docs/resource/32a60789-ae38-4c4b-8986-a2fc1c5d28f2\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/32a60789-ae38-4c4b-8986-a2fc1c5d28f2_document.pdf). *See generally* WIKIPEDIA, <http://en.wikipedia.org> (last visited Dec. 3, 2012).

needs to be dedicated to hard-copy books.<sup>60</sup> Legal content, like the encyclopedia, is trending fast and furiously toward fast and free.

Not only have today's legal research tools and reporters moved from hard copy to digital, so have firms' and companies' document and content management systems. The perfection and widening deployment of knowledge management systems signals the decline of customized research and substantive memo writing other than in novel areas or when the task is the application of law to the specific facts of the case.<sup>61</sup> "The concepts behind knowledge management seem like common sense: stop reinventing the wheel, capture what we know as a firm before people leave or retire, and exploit that knowledge to gain a business advantage."<sup>62</sup> Good knowledge management tools yield overall system efficiencies.

Already, we see law firms offering content free to clients. And some clients are demanding that law firms populate the clients' knowledge management databases.<sup>63</sup> Law firms that have not yet adopted advanced knowledge management tools need to move quickly to do so. These changes will raise interesting questions (such as who owns the content), but those issues will be resolved because clients simply are unwilling to pay top dollar for something they know already exists "somewhere out there."<sup>64</sup>

And if a firm is managing its work for profitability, it needs to

60. I still find them easier to read.

61. See SUSSKIND, *supra* note 4, at 2, 25–57, 87–93.

62. Andrew Terrett, *KM Struggles to Survive While Legal Project Management Thrives*, in INT'L LEGAL TECH. ASS'N, KNOWLEDGE MANAGEMENT: CONVEYORS OF ORGANIZED INFORMATION 46 (2011), available at <http://read.uberflip.com/i/34417/44>.

63. For example, LegalOnRamp has created a knowledge management collaboration website for the Pfizer Legal Alliance. See Rosenthal, *supra* note 21, at 25; see also McMahon, *supra* note 30 (discussing Pfizer's Legal Alliance, a standalone collaborative venture between in-house attorneys and nineteen outside firms offering "a large and broad knowledge base to the company . . . 'who have gotten to know . . . each other's shared expertise—all of which has served to educate [Pfizer's] in-house lawyers'"). See generally *Resources & Networks*, LEGAL EXECUTIVE LEADERSHIP, <http://www.legalexecutiveleadership.com/resources-networks> (last visited Sept. 2, 2012) (documenting knowledge management practices of companies such as BMO Financial Group, Intel, Cisco Systems, and Symantec).

64. See Susan Hackett, *If Lawyers Sell Legal Expertise to Clients, Who Owns the Resulting Product?*, A.B.A.J. (Apr. 17, 2012, 7:30 AM), [http://www.abajournal.com/legalrebels/article/if\\_lawyers\\_sell\\_legal\\_expertise\\_to\\_clients\\_who\\_owns\\_the\\_resulting\\_product/](http://www.abajournal.com/legalrebels/article/if_lawyers_sell_legal_expertise_to_clients_who_owns_the_resulting_product/) (setting out a commentary on ownership rights in materials reused by clients, shared among the client's firms, and even shared among client's peer companies). See generally JAMES INGRAM & LINDA RONSTADT, *Somewhere Out There*, on AN AMERICAN TAIL (1986).

maximize the profit potential of each piece of work. That profit maximization is enabled by state-of-the-art knowledge management tools that allow work to be easily retrieved, used again, reshaped, and redeployed. Using knowledge management tools, a firm is able to avoid recreating content, which allows more competitive pricing and higher profitability.<sup>65</sup>

Knowledge management seems to be lagging other technological advances. This is one area where clients will need to continue to push the profession to do what is right for the system as a whole. While good knowledge management systems make enormous intuitive sense, the billable-hour model simply gets in its way. It takes enormous effort to create and keep a knowledge management system current. Those are hours not being billed. In addition, U.S. firms tend to view development of a knowledge management system as a back-office, information technology function, not as a required responsibility of each lawyer in the firm. Nevertheless, clients will demand it, and entrepreneurial firms will obtain business advantages if they can break through the road blocks.

## 2. *Artificial Intelligence*

Knowledge management systems create the content foundation for the development of more advanced tools that will help lawyers achieve consistent and predictable results at reasonable costs by taking advantage of advancements in artificial intelligence. One is astounded by the capabilities futurists are predicting next—capabilities which will integrate the content from knowledge management tools with knowledge analytics.

By 2020, some futurists predict the computer will have the same capacity as the human brain, and by 2050, a computer will have computing capacity equal to all humanity.<sup>66</sup> These futurists

---

65. MODEL RULE OF PROF'L CONDUCT R. 1.5 (1983) prohibits lawyers from billing clients for "recycled" work, meaning a lawyer cannot bill a client for work performed for a different client that fortuitously is relevant to another matter. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (1993). "A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated." *Id.* The lawyer is only able to bill the second client for the time spent updating the work for the new matter, since that is the time actually spent on the second client's behalf. *See id.* Market-valued pricing helps avoid this issue. *See infra* note 189.

66. KINGSLEY MARTIN, THE END GAME I (Oct. 2011), *available at* [http://collegeoflpm.org/wp-content/uploads/2012/01/2011\\_Disruptive](http://collegeoflpm.org/wp-content/uploads/2012/01/2011_Disruptive)

argue that the human brain will be successfully reverse-engineered by the mid-2020s, and by 2045 the quantity of artificial intelligence created will be about a billion times the sum of all the human intelligence that exists today.<sup>67</sup>

Developments underway, which will partially automate various legal content and processes, are not necessarily the province of law firms. Today, search engines allow us to expand the scope of what used to be manual searches to more sources, more records within those sources, as well as to obtain the results nearly instantly. Today, people—often contract or outsourced lawyers—still read and analyze those results. Process discipline and outsourcing or off-shoring have taken some of the costs out of human review and analysis and reduced the time to results, and arguably, improved quality. Tomorrow, applications based on artificial intelligence will displace many of those contract lawyers, disrupting the disruptors of a few years ago. Perhaps within a decade or two, applications will be able to propose the strongest legal arguments and assign chances of success to them or identify the best deal structure to achieve a specified set of business objectives.<sup>68</sup>

These capabilities are on the immediate horizon. Called “quantitative legal prediction,”<sup>69</sup> algorithms make predictions on the odds of winning a case or how best to craft legal arguments. Current efforts focus on identifying and analyzing settlement patterns and win rates in intellectual property cases, analysis of how individual courts address particular issues, chances of success in an EEOC matter by type of claim, and data on billings and time by task to be used to price cases. Clearly, applications are moving from the identification and classification of information to its analysis and on

---

-Technologies.TheEndGame.Kingsley-Martin.pdf.

67. Lev Grossman, *2045: The Year Man Becomes Immortal*, TIME, Feb. 10, 2011, <http://www.time.com/time/magazine/article/0,9171,2048299.00.html#ixzz1aUdQsuWC>.

68. Two examples show where this technology is headed. NeotaLogic, for example, claims it “can analyze very large data sets, classify the data objects, feed the results into powerful data visualization tools, and produce maps of the law.” MARTIN, *supra* note 66, at 3. Recommind, as another example, by using certain documents as exemplars, uses “machine learning technology to identify and prioritize similar documents across an entire corpus—in the process literally ‘reviewing’ all documents in a corpus, whether 10 megabytes or 10 terabytes.” *Id.* (quoting JAN PUZICHA, RECOMMIND, PREDICTIVE CODING EXPLAINED 2 (2012)).

69. See Debra Cassens Weiss, *Databases Will Help Lawyers Craft Arguments, Make Lawsuit Decisions*, A.B.A. J. (June 5, 2012, 4:30 AM), [http://www.abajournal.com/news/article/databases\\_will\\_help\\_lawyers\\_craft\\_arguments\\_make\\_lawsuit\\_decisions/](http://www.abajournal.com/news/article/databases_will_help_lawyers_craft_arguments_make_lawsuit_decisions/).

to assessing the likely success of various strategies. Search tools have progressed to predictive coding, which is progressing to quantitative legal prediction. When these functionalities converge and maximize the use of massive historical databases, it is easy to imagine that a substantial set of legal tasks will be automated or semi-automated.<sup>70</sup>

Today's online "do-it-yourself" legal tools offer a preview.<sup>71</sup> The net generation wants and expects to obtain services online. They diagnose their ills online to determine whether to take the more inconvenient step of seeing a doctor.<sup>72</sup> They do their taxes online. They make their dinner reservations online. They play word games online with friends around the world. And they do it all for free. From their vantage, why should they address basic legal services differently? We now see online offerings for common consumer legal services using hybrid approaches ranging from vendors that only provide forms and documents to online lawyer-assisted drafting. These tools will enable the legal profession to address the thorny problem of how to provide cost-effective legal services to the many consumers currently priced out of today's legal market.<sup>73</sup> One commentator has even suggested that, before long, "intelligent legal forms will cost no more than a song on iTunes."<sup>74</sup>

For those of us in the world of providing more complicated

70. See MARTIN, *supra* note 66, at 6. Imagine this futuristic scenario for the litigation practice in your firm: An administrative employee accesses the firm's IT applications, types in the client's facts as they have been related to you, and delivers an analysis that sets out your client's key legal arguments, their likelihood of success assuming the facts as presented are true, and some proposed next steps. When your document processor has digitally collected your client's documents and conducted an automated document review, your administrative assistant reruns the program, providing you with modified results based on the documented facts as now understood including a list of key documents and witnesses, a revised assessment of arguments, and the likelihood of success on each. You also get a list of suggested further avenues to explore because the artificial intelligence embedded in the system will tell you what additional factual developments would affect potential outcomes and to what degree. Further work is narrowly targeted, and your process is iterative as you add interview summaries, deposition transcripts, expert reports, new factual developments, etc. Diagnostic tools are already available in medicine. Our profession cannot be too far behind.

71. See, e.g., Richard Granat, *Advancing Justice in an Age of Intelligent Machines*, in C. L. PRAC. MGMT., DISRUPTIVE TECHNOLOGIES 18-28 (2011), available at [http://collegeoflpm.org/wp-content/uploads/2012/01/2011\\_Disruptive-Technologies-COLPM-2011.pdf](http://collegeoflpm.org/wp-content/uploads/2012/01/2011_Disruptive-Technologies-COLPM-2011.pdf).

72. See, e.g., WEBMD, <http://www.webmd.com> (last visited Sept. 4, 2012) (providing a "symptom checker" tool).

73. See Granat, *supra* note 71, at 19.

74. *Id.* at 27.



legal services to businesses, these online, consumer-directed technologies will prove themselves on the web and move rapidly into the commercial market space, driving changes in the way our business clients procure legal services.<sup>75</sup> Perhaps the best, current example of a displacing technology on the cusp of mass adoption is the increasing use of predictive coding systems.

### 3. Document Management Systems and Predictive Coding

Not only are knowledge management systems and analytics changing how we work, but analytics are also driving advancements in the processing of client documents. In fact, they are advancing at a faster pace than knowledge management tools.<sup>76</sup> Predictive coding capabilities are rapidly changing the way lawyers conduct discovery and document review.<sup>77</sup> The exciting part for clients is that review costs are projected to be a fraction of what they would be for traditional human document review. The price for this process work has dropped dramatically while maintaining or increasing quality.<sup>78</sup>

The soon-to-be-prevailing view is that it is a “myth” that “‘eyeballs-on’ review of each and every document” in a document

75. See generally *id.*

76. Terrett, *supra* note 62, at 128.

77. Matthew Nelson, *Shining a Light into the Black Box of E-discovery Predictive Coding*, LAW.COM (May 29, 2012), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202556081861>. Nelson defines predictive coding as “a type of machine-learning technology that enables a computer to automatically predict how documents should be classified based on limited human input.” *Id.* The review process

begins by feeding “relevance” and “privilege” decisions made by attorneys about a small number of case documents called a “seed set” into a computer system. The computer then relies on these “training” decisions to create an algorithm that ranks and codes the remaining documents automatically. The attorneys can then evaluate the accuracy of the computer’s automated decisions . . . [and] conduct further training until the required accuracy levels are achieved.

*Id.*

78. Henderson argues that one firm’s (Novus Law) ability to generate substantially reduced document management costs derives from “world class project management and process engineering,” which broke down reviewing, managing, and analyzing documents “into nearly 1,000 decision points, which are arrayed in an optimal order and collapsed into a smaller number of highly efficient steps using business practices found in accounting, aviation, healthcare, manufacturing, and other industries.” Henderson, *supra* note 15, at 385. This process yields a documented accuracy rate of 99.9% to 100.0%, compared to an AmLaw 100 firm accuracy rate of 78% to 91%. *Id.* Novus Law also claims that its measurable quality is identical between U.S. and overseas attorneys. *Id.* at 386.

set “will identify *essentially all* responsive (or privileged) documents; and that computers are *less reliable* than humans in identifying responsive (or privileged) documents.”<sup>79</sup> A recent study concluded that “humans *miss a substantial number* of responsive (or privileged) documents; computers—aided by humans—*find at least as many* responsive (or privileged) documents as humans alone; and computers—aided by humans—*make fewer errors* on responsiveness (or privilege) than humans alone, and are *far more efficient* than humans.”<sup>80</sup> In fact, the study’s bottom line conclusion was this: technology-assisted review was fifty times more efficient than exhaustive, manual review and generated as many responsive documents with more precision.<sup>81</sup>

Lawyers have wondered whether opponents, and ultimately courts, will accept computer-assisted review. That answer will be yes. In *Moore v. Publicis Groupe*, the court issued the first reported decision approving the use of computer-assisted review.<sup>82</sup> There, the parties apparently had agreed in advance to the use of predictive coding software, although there were differences between them regarding how best to implement the process. In resolving those differences, the court wrote:

The court recognizes that computer-assisted review is not a magic, Staples-Easy-Button, solution appropriate for all cases. The technology exists and should be used where appropriate, but it is not a case of machine replacing humans: it is the process used and the interaction of man and machine that the courts need to examine.<sup>83</sup>

The court recognized the ground-breaking nature of its opinion, suggested that the bar take note, and expressed the view that “computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review.”<sup>84</sup>

---

79. Maura R. Grossman, *Disruptive Legal Technologies: Technology-Assisted or Automated Document Review*, in C. L. PRAC. MGMT, *supra* note 71, at 30.

80. *Id.*

81. *Id.* at 41. See generally Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011).

82. No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).

83. *Id.* at \*8.

84. *Id.* at \*12.

While predictive coding may still be in its toddler phase, its widespread use is around the corner.<sup>85</sup> Courts will continue to grapple with the technology,<sup>86</sup> and mistakes will be made, but “[t]he financial stakes are high for corporations looking to cut litigation costs, and for the solution providers who stand to profit handsomely from building a better predictive coding mousetrap. Smart businesspeople know that change is around the corner.”<sup>87</sup> And no outside counsel will argue against equal accuracy at a fraction of the cost.

The combination of knowledge management tools, artificial intelligence, and document management technologies will change the practice of law as we know it. How fast that will happen is subject to debate,<sup>88</sup> but that it will happen is rapidly playing out in the market. Learning to maximize the use of these tools and to use them to advance your firm’s interests may be one factor that separates some of the winners and losers in the new legal order.

#### D. *A Flattening World Means an Expanding Brief*

Not only is the “how” of legal work rapidly changing, so is the “what” of that work. Globalization is changing the legal services clients need from their lawyers. While much has been written about the threat to the U.S. legal market by the outsourcing of legal work to various lower cost jurisdictions<sup>89</sup> (and this trend will

85. See, e.g., Monica Bay, *Survey Shows Surge in E-Discovery Work at Law Firms and Corporations*, LAW.COM (July 6, 2012), [http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202561944663&Survey\\_Shows\\_Surge\\_in\\_EDiscovery\\_Work\\_at\\_Law\\_Firms\\_and\\_Corporations&slreturn=20120726230110](http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202561944663&Survey_Shows_Surge_in_EDiscovery_Work_at_Law_Firms_and_Corporations&slreturn=20120726230110) (reporting significant increases in the use of predictive coding and noting that it “is much less about the technology . . . and significantly more about the professionals—legalists and technologists who are designing, shaping, and executing the various workflows that accompany predictive coding systems” (quoting David Cowen, Managing Partner of The Cowen Group)).

86. See, e.g., *Kleen Prods., L.L.C. v. Packaging Corp. of Am.*, 775 F. Supp. 2d 1071 (N.D. Ill. 2011); *Global Aerospace, Inc. v. Landow Aviation, L.P.*, No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012).

87. Nelson, *supra* note 77.

88. See *infra* Part I.E.

89. See, e.g., Chambliss, *supra* note 13, at 338–39 (“Many ‘complex legal matters’ that large law firm associates traditionally have performed in fact have turned out to be subject to automation and commoditization, leading to increased competition from foreign lawyers and non-legal service providers, and a drop in large law firms’ demand for new graduates . . . . [G]lobalization of corporate legal services and advances in information technology have introduced a second important source of segmentation within the profession . . . . [I]t may be the most interesting, remunerative, and socially valuable legal work in the coming years will

no doubt continue until technology disrupts the need for human resources in document management),<sup>90</sup> the more interesting and important aspect of globalization is that, as business operations globalize, the type of legal services clients need also globalizes. Required services are evolving from single geographical or jurisdictional based issues to a critical need for multijurisdictional solutions to complex cross-border issues. Even though the advice needed is correspondingly more complex—because the globe works 24/7—the time needed to obtain input and apply it to business operations is rapidly compressing.<sup>91</sup> Law firms and clients must travel this road together. Contemplate this service mark: “*Global solutions at the speed of business.*”<sup>92</sup>

There is a “sea change” taking place in the legal marketplace in order to “keep pace with the demands of a rapidly globalizing [business] world.”<sup>93</sup> Even the smallest companies do business in multiple jurisdictions. Documents and other digital data move across borders at the press of an iPhone “send” key, and digital data do not stop for passport checks. With this sea change comes both opportunities and challenges.<sup>94</sup> Opportunities come from business relationships that do not stop at country borders, the increase in global regulation, and the fact that even modest-sized clients compete in global markets, all of which increase the demand for cross-border expertise. Challenges come from clients’ unwillingness to pay for that advice at the rates demanded under the traditional billable-hour model, ethics rules governing cross-

---

occur completely outside of large law firms, and in competition with them, in areas such as knowledge management and software system design.” (footnotes omitted)); David Hechler, *Dispatches from ALM’s 2012 General Counsel Conference*, LAW.COM (June 14, 2012), <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202559352974>; see also BD. OF GOVERNORS’ CHALLENGES TO THE PROFESSION COMM., *supra* note 6, at 20.

90. See John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 4, 2011, <http://www.nytimes.com/2011/03/05/science/05legal.html>.

91. See generally THOMAS FRIEDMAN, *THE WORLD IS FLAT* (2005), for a discussion of the increasing speed of business in a globalizing world.

92. U.S. Trademark Application Serial No. 85663231 (filed June 27, 2012).

93. William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, A.B.A. J., July 2011, at 40, available at [http://www.abajournal.com/magazine/article/paradigm\\_shift/](http://www.abajournal.com/magazine/article/paradigm_shift/).

94. *Id.* at 47; see also Zahorsky, *supra* note 5 (“Legal pricing isn’t falling through the floor, notwithstanding all those competitors, because of the legal complexity with which our clients must contend at the critical crossroads of the 21st century—globalization, regulation and innovation.”).

border practice, the movement of commodity work to developing markets, and the fact that lawyers in emerging markets are destined to become a formidable economic force.<sup>95</sup>

I've lived this change. In the consumer electronics industry, routine supply arrangements now regularly involve multiple jurisdictions. While lawyers must pay attention to country borders and differing legal regimes, supply chains are geographically agnostic. An original equipment manufacturer (OEM) of a consumer electronics product located in Korea might purchase a component from a U.S. company's Japanese subsidiary. The component might be manufactured in Taiwan by the U.S. company's contract manufacturer which drop ships the component directly into China for assembly at the OEM's outsourced Chinese manufacturer. Complex supply chains like these buzz along at mind-boggling speed in order to meet escalating global demand.

In-house business lawyers are charged with developing appropriate documentation for these complex, cross-border transactions. The more traditional model of contract review by lawyers in each country involved is not workable. It quickly became apparent that my clients needed a new approach—to what services were needed, who would provide them, and what would be a fair price to pay. The solution was to designate in-house lawyer-project-managers who owned the drafting projects for the range of contracts needed; in turn, they solicited advice from pre-identified local country legal resources on local law issues and integrated those inputs into pre-existing templates. Each contract process was managed by one person, and external resources were sparingly used. The team included in-house counsel in multiple jurisdictions, outside counsel in multiple jurisdictions,<sup>96</sup> and business people in multiple jurisdictions. Most external resources were local country firms—chosen from a network developed over many years—and their advice was integrated by the in-house lawyer who also was the face to the global business team.

Imagine the need to assess the antitrust implications of a business's pricing strategies that will span multiple Asian countries. U.S. lawyers can analyze U.S. antitrust considerations. European

95. Henderson & Zahorsky, *supra* note 93, at 47.

96. See generally Chambliss, *supra* note 13, at 351 ("U.S. law students face a future in which they will be competing not just with other U.S. lawyers but also with foreign lawyers and non-lawyers, who will not be regulated—or socialized—the way U.S. lawyers traditionally have been.").

lawyers can discuss European competition law considerations. Lawyers in Japan, Korea, Taiwan, China, Hong Kong, Singapore, Australia, and India are able to report the requirements in their individual countries. But where is the integrator<sup>97</sup>—that one lawyer who synthesizes all these countries' laws into counsel that can be implemented realistically by the business team in the window of time in which they need it? Think of the value proposition of that integration service.<sup>98</sup> To this article's point, this is one example of "value" that far exceeds the normal hourly rate charge.

Globalization means that the advice needed today is frequently not geographically limited in scope. The ability to integrate advice to facilitate cross-border business is highly valued in the new legal order. This need for integrators is increasing in business today, and will be even more important tomorrow. This unmistakable trend, like many of the trends discussed here, is accelerating at a pace that I believe many underestimate.

*E. Time Keeps on Slipping into the Future*<sup>99</sup>

These drivers affect all businesses generally but are driving specific and profound changes to the practice of law, which will cause a sharp shift away from the billable hour. I believe a "tipping point" looms.<sup>100</sup> Failing to understand the fact of the impending change or failing to accurately predict the velocity of that change could easily result in your firm being "decontented."<sup>101</sup> I suspect

97. A friend, who is a general counsel of a major health care company, puts it this way: "I can get specialized legal advice; what I cannot find are integrators, those lawyers who can integrate that advice into practical, pragmatic advice in my clients' language." I've adopted her concept of integrators in this article.

98. This is not to suggest that we as lawyers ignore our licensing restrictions. [T]here is a push for changes in multijurisdictional practice rules to permit lawyers with a license in one state (or even country) to practice in another state (or even country) without qualifying for separate admission to that state (or country's bar) . . . . In-house lawyers for multijurisdictional companies already have some degree of flexibility in this regard, but lawyers in private practice do not.

BD. OF GOVERNORS' CHALLENGES TO THE PROFESSION COMM., *supra* note 6, at 14.

99. STEVE MILLER BAND, *Fly Like An Eagle*, on FLY LIKE AN EAGLE (Capitol Records 1976) ("Time keeps on slippin', slippin', slippin'; Into the future.").

100. Malcolm Gladwell, in THE TIPPING POINT 12 (2005), defines the "tipping point" as "the moment of critical mass, the threshold, the boiling point," at which something—his analogy is an epidemic—that has been building slowly explodes into the consciousness of thought.

101. As a materials supplier, you are "decontented" when another supplier's offering replaces your offering.

that when the tip happens, the velocity of ensuing change will take many practicing lawyers by surprise.

On some level, the lack of attention is understandable. It is hard to see the effects of exponential growth in the early years. As growth takes hold, the speed increases enormously. Just as in the case of the lily pond in which the lilies double in size each day, on the day before the pond is completely covered, open water still covers half the pond.<sup>102</sup>

These concepts of exponential growth and tipping points are critical to preparing for change. In my time working in the consumer electronics industry, I witnessed four of these tipping points and the resulting displacement of the then-existing incumbent technology. Each had one thing in common: even very knowledgeable people working in the industry dramatically underestimated the rate of change—every time.<sup>103</sup>

*Fax to E-mail.* From the time when the first commercial facsimile machine was introduced to the law office environment, to the mid-1990s when it was the preferred means of instant communications between clients and lawyers, fax machines had their moment in time.<sup>104</sup> “By the late 1980s, compact fax machines had revolutionized everyday communications around the world.”<sup>105</sup> While this was happening, and lawyers were bemoaning the loss of thinking time that resulted from near-instant communications, e-mail systems appeared on the horizon.<sup>106</sup> When issues around e-mail interoperability were resolved, e-mail almost instantly displaced the use of fax machines for “real-time” communications.<sup>107</sup> The technology “tipped” and within a few years

102. Martin, *supra* note 66, at 6.

103. I remember one such conversation vividly. A colleague predicted that those bulky cathode ray tubes (CRT) on our desks would be “gone in five years,” which would create a bright future for the product we planned to sell that helped enable liquid crystal displays (LCD). The actual change was complete in all of eighteen months—which was good for our business, but not so for component suppliers of CRT manufacturing.

104. See *Fax Machine*, THE GREAT IDEA FINDER, <http://www.ideafinder.com/history/inventions/fax.htm> (last modified Feb. 2005) (“Between 1973 and 1983, the number of fax machines in the United States increased from 30,000 to 300,000, but by 1989 the number had jumped to four million.”).

105. *Id.*

106. *Email*, WIKIPEDIA, <http://en.wikipedia.org/w/index.php?title=Email&oldid=506626792> (last modified Aug. 30, 2012).

107. Fax technology peaked in the early 1990s. See Jason Chavis, *History of the Fax Machine*, EHOW, [http://www.ehow.com/about\\_4585972\\_history-fax-machine](http://www.ehow.com/about_4585972_history-fax-machine)

the business—and legal—world had converted.

*CRTs to LCDs and then to LEDs:* Remember those big, bulky televisions of old, powered by cathode ray tubes, or CRTs for short? My first exposure to Star Trek was in front of one, and I marveled at the science fiction of that big display in front of Captain Kirk, that was both a window and what we would now call a video conferencing display—not so fictional now. The first flat panel liquid crystal display (LCD) for a computer monitor was commercially sold in the mid-1990s.<sup>108</sup> By the end of the year 2007, LCD monitor sales exceeded CRT monitor sales, and by 2008, worldwide sales of televisions with LCD screens surpassed the sale of CRT units.<sup>109</sup>

Now, a mere four years later, “CRT-based computer monitors and televisions constitute a dead technology.”<sup>110</sup> What were CRT manufacturers doing as this emerging LCD industry was about to overtake them? It appears they were sitting on the fence.<sup>111</sup> Slow response and late entry allowed the power in the industry to shift precipitously from the CRT manufacturers to the LCD manufacturers.<sup>112</sup>

The second half of the LCD story reprises the first half. LCDs contain compact florescent bulbs (CCFLs) to light the display. But CCFL technology has limitations, and it is rapidly being replaced by light emitting diode (LED) lighting. Sony introduced the first LED

---

.html (last visited Sept. 1, 2012). It was in early 1993 that America Online and Delphi connected their e-mail systems to the Internet, beginning the rapid, global adoption of e-mail and setting a new communication standard. *Email History*, LIVING INTERNET, <http://www.livinginternet.com/e/ei.htm> (last visited Sept. 1, 2012).

108. *Computer Monitor*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Computer\\_monitor](http://en.wikipedia.org/wiki/Computer_monitor) (last modified Aug. 28, 2012).

109. In the fourth quarter of 2007, LCD televisions surpassed CRT units in worldwide sales; by 2008, it was projected that LCD televisions would obtain a 50% market share, according to Display Bank. *Liquid Crystal Display*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Liquid\\_crystal\\_display](http://en.wikipedia.org/wiki/Liquid_crystal_display) (last modified Aug. 30, 2012).

110. *Cathode Ray Tube*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Cathode\\_ray\\_tube](http://en.wikipedia.org/wiki/Cathode_ray_tube) (last modified Aug. 28, 2012).

111. Hirohisa Kawamoto, *The History of Liquid-Crystal Displays*, 90 PROC. IEEE 460, 497–98 (2002) (“When the LCD was invented, the electronic giants that owned the CRT business *did not* participate in the LCD business . . . . The companies that had not participated in the CRT business instead had gone into the LCD business and later profited . . . . The members of the LCD industry are now in the major leagues.”) (emphasis added)).

112. *See id.* at 498.



television in 2009.<sup>113</sup> Three years later, industry experts predict that by the end of 2014 LED backlighting will kill CCFL designs.<sup>114</sup> As a CCFL supplier, your business would have moved from roughly 100% market penetration in 2009 to 0% in five years—a classic demonstration of a “tipping point” leading to decontenting, with brutal economic consequences for the incumbent technology.

*Clicks to Touch:* The world’s first computer mouse arrived in 1963, and it turned the computer from a machine for scientists and engineers into a tool anyone could use. The first significant touch-enabled, hand-held smartphone—the iPhone—was sold in 2007.<sup>115</sup> Today, a mere five years later, touch-enabled smartphones and tablets dominate the market. Now, technology gurus predict the death of the mouse. “Apple disposed of the floppy disk because it saw it as technology past its prime, and the MacBook Air has no optical drive . . . . The touch screen, in tablets, netbooks, hand-helds and even possibly the desktop, could well spell the demise of the mouse.”<sup>116</sup> And as displacing as touch displays are to the mouse, the next displacing technology threatening touch technology is just around the corner. “Soon we may not even use our hands to control technology—if Google’s futuristic glasses come to fruition.”<sup>117</sup> Imagine “a three-dimensional interaction [that] . . . would allow users to more easily bring objects forward, push them back or rotate them within the smartphone’s graphical

113. *LED Display*, WIKIPEDIA, [http://en.wikipedia.org/wiki/LED\\_display](http://en.wikipedia.org/wiki/LED_display) (last modified Sept. 1, 2012); *The Evolution of LED TV Market—Survival of the Fittest*, SHINING, <http://www.shining-oe.com/en/newsinfo/11.html> (last visited Sept. 7, 2012).

114. Jimmy Kim, *Lower-Cost LED Backlights Darken CCFL’s Future*, ELECTROIQ (May 7, 2012), <http://www.electroiq.com/articles/sst/2012/05/lower-cost-led-backlights-darken-ccfl-future.html>.

115. *Smartphone*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Smartphone> (last modified Aug. 31, 2012) (“In 2007, Apple Inc. introduced the original iPhone, one of the first mobile phones to use a multi-touch interface. The iPhone was notable for its use of a large touchscreen for direct finger input as its main means of interaction, instead of a stylus, keyboard, and/or keypad as typical for smartphones at the time.”).

116. Garry Barker, *Will Touch-Screens Replace Mice?*, STUFF, <http://www.stuff.co.nz/technology/2328087/Will-touch-screens-replace-mice> (last updated Nov. 4, 2009); see also Matthew DeCarlo, *WOF: Will Touch Replace Keyboards and Mice?*, TECHSPOT (Oct. 8, 2010, 10:43 PM), <http://www.techspot.com/news/40600-wof-will-touch-replace-keyboards-and-mice.html>.

117. Jeremy Cabalona, *How Will We Interact with Technology in the Future?* [CONTEST], MASHABLE (May 5, 2012), <http://mashable.com/2012/05/05/future-of-technology-contest/>.

user interface.”<sup>118</sup> Beam me up, Google.

The lessons I take from the rough and tumble of the consumer electronics industry are these. First, remember the lilies.<sup>119</sup> Change sneaks up, especially on the incumbent. In our industry, traditional hourly billing law firms are the incumbent technology. Act decisively because a slow response to displacing technologies can leave you sidelined. Second, mastering today's new approaches doesn't relieve you from mastering the next changes on the horizon. You can't stop thinking about tomorrow,<sup>120</sup> because, in rapidly changing environments, incumbency is short-lived. Finally, the new generation of lawyers “measuring our desks”<sup>121</sup> have a serious appetite to try, and then validate, new technologies. They will set the pace of adoption, which can be bewildering to Luddites among us.<sup>122</sup> Take their lead and learn from them.

How can we argue that the legal industry is immune from displacing technologies? If you are more comfortable with the status quo, ponder: if the huge consumer electronics industry can change in what feels like a business-instant, so can law. Business people speak in terms of “contenting” and “decontenting” of their products. It works the same way in our profession. My field, related to the Foreign Corrupt Practices Act, exploded in recent years in response to an uptick in enforcement. But “decontenting” can also happen almost overnight. For document collection, processing, and review, the tipping point may be behind us. If not already, then it's just around the corner.<sup>123</sup> The final barrier to

118. Michael Kan, *Huawei Aims to Provide Touch-Free Smartphones, Tablets*, INFOWORLD (Apr. 27, 2012), <http://www.infoworld.com/d/mobile-technology/huawei-aims-provide-touch-free-smartphones-tablets-191937> (citation omitted) (internal quotation marks omitted).

119. See MARTIN, *supra* note 66, at 6; see also *supra* Part I.E.

120. See generally FLEETWOOD MAC, *Don't Stop, on RUMOURS* (Warner Bros. 1977).

121. I do not know the source of this phrase other than that one evening, coming home from work, I commented on something that happened that day, and my son asked me whether a colleague was “measuring my desk” and I immediately understood the point.

122. *Luddite*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Luddite> (last modified Aug. 6, 2012) (explaining that a Luddite is one resistant to change produced by the Industrial Revolution); see also SUSSKIND, *supra* note 4, at 83–87.

123. See THE COWEN GROUP, Q2, 2012 QUARTERLY CRITICAL TRENDS SURVEY REPORT 1–2 (2012), available at <http://cowengroup.com/documents/qtrend.2012.q2.pdf>; see also Bay, *supra* note 85 (reporting that The Cowen Group survey shows a sharp spike in the outsourcing of electronic data discovery work and predictive coding). The numbers speak for themselves: 70% of law firms reported an increase in workload for their litigation support groups, up from 42%; 77%

entry may be the “incumbents’ reluctance to rethink the boundaries of monopoly protection.”<sup>124</sup> But, with the United Kingdom and Australia well on their way to deregulating the legal profession, the United States cannot be far behind. As an optimist, I see opportunity around that corner. As the pace of change accelerates and we as lawyers adapt, there will be no end to the need to “keep on moving”<sup>125</sup> and to avoid the complacency of the incumbent.<sup>126</sup> This means mastering both new technologies and new-to-the-lawyer skills.

## II. PLUS FACTORS: THE SKILLS OF THE NEW LEGAL ORDER

The changes looming for the legal profession will not result in the destruction of the profession as we know it. Change need not be apocalyptic. But change does create an opening for innovation and, innovation creates opportunity. To capitalize on the opportunities created, there are seven non-legal skills needed in addition to those legal skills now acknowledged as the skills of our craft. To new associates, and the nimble among current practitioners, affirmatively perfecting these skills will help cement your place in the new legal order.

Making these seven non-legal skills your new seven habits<sup>127</sup> will take you eighty percent of the way toward capturing value from the innovations produced by the drivers we’ve discussed. To be highly successful, you will need to master:<sup>128</sup> (1) the language of business,

---

percent of corporations report a similar spike in work; 55% of corporations and 62% of firms anticipate outsourcing a significant portion of this work; 49% of firms and 23% of corporations now report using predictive coding technologies. THE COWEN GROUP, *supra*.

124. Chambliss, *supra* note 13, at 347.

125. See generally SOUL II SOUL, *Keep on Movin’*, on CLUB CLASSICS VOL. ONE (Virgin Records 1989) (“Keep on moving; Don’t stop like the hands of time; Click clock; Find your own way to stay; The time will come one day.”); THE DOOBIE BROTHERS, *Rockin’ Down the Highway*, on TOULOUSE STREET (Warner Bros. 1972) (“Can’t stop, and I can’t stop; Got to keep on, movin’ or I’ll lose my mind; Oh, rockin’ down the highway.”).

126. Bartlit, *supra* note 21 (“Those who have been most successful in the old, outmoded paradigm are the last to understand and adopt a new paradigm.”).

127. In recognition of John Ursu’s leadership while General Counsel of 3M Company, who first taught me the “seven habits.” See generally STEVEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE* (2004).

128. There are five important steps to mastering a skill. If you want to change a certain behavior, use these steps to create a practice regimen that, over time, will make it automatic:

1. Script the new behavior. Write down exactly what you’d like your new

(2) your chosen knowledge management tools, (3) document management and artificial intelligence tools, (4) traditional unit-cost analysis and market-based pricing models, (5) project management, (6) cross border practice and virtual teaming, and (7) change management.

A. *Talk Your Clients' Talk*

Frequently, business people comment on whether a colleague “walks the talk.”<sup>129</sup> Here, it’s important to “talk the talk.” In-house lawyers constantly are exposed to their businesses’ quality, productivity, and cost initiatives, and they are enthusiastic participants in them. They learn to talk that language. Whether it is “total delivered cost,” six sigma, a prohibition on “sole sourcing,” or supplier “convergence,” they hear it, learn about it, participate in it with their business teams, and volunteer—or are asked to volunteer—to drive it into their legal organizations. In-house, I participated in exercises with my business team around “house of quality,” “voice of customer,” and six sigma; became a “belt” and then a “champion”; participated in innumerable projects; adopted “lean six sigma”; and designed templates for use in sole source initiatives and other new purchasing programs—and the list goes on.<sup>130</sup> “Legal spend,”<sup>131</sup> especially in large corporations, is a significant cost of doing business. It is unrealistic to think legal

---

behavior to be. Be specific and make it quantifiable . . . .

2. Practice it . . . perfectly. The homily “practice makes perfect” is itself imperfect. In fact, “perfect practice makes perfect.” To hard-wire a behavior, you must push yourself to repeat it religiously—and correctly.

3. Rebound and fix. You will probably stumble and forget at first. Pick yourself up and keep going. Don’t let a temporary setback turn into an excuse to fail. Stick with it, despite setbacks.

4. Accelerate through mental rehearsal. The behavior will become automatic more quickly if you take extra time to *imagine* yourself doing the behavior, thus creating a positive outcome.

5. Make it part of your identity. Turn the behavior into a character attribute that’s part of who you are and what you value.

Geoffrey James, *How to Master Any Skill*, INC., (Feb. 21, 2012), <http://www.inc.com/geoffrey-james/how-to-master-any-skill.html>.

129. See generally *Walk the Talk*, WIKIPEDIA, [http://en.wiktionary.org/wiki/walk\\_the\\_talk](http://en.wiktionary.org/wiki/walk_the_talk) (last modified Aug. 31, 2012) (“To do what one said one could do, or would do, not just making empty promises.”).

130. I will avoid an explanation of each of these business terms. If you recognize them and know how they apply to your work, wonderful. If you do not, that’s the point of this section. Teach yourself today’s business language.

131. Yes, businesses refer to it as “legal spend.”

departments are not worthy targets for the company's quality, productivity, and cost-reduction initiatives.

Outside counsel need to be able to explain their value proposition in the clients' business language. It is not "lingo" in the pejorative sense of that word, but it is a language unto its own. Seek out good articles, read the then-in-vogue business books, think about the application of those principles to the legal industry, talk to your clients about them, talk to your colleagues about them, and adopt them in your own firm. To outside lawyers, I suggest talking to your in-house clients specifically about their current programs, the internal measurements required by those programs, how those measurements have been applied in the legal department, and how you might be able to help them achieve those financial and efficiency goals. And you will be able to communicate it all in your clients' language.

To in-house lawyers, I suggest talking to your outside firms about your company's programs so they understand your pressures, the objectives the company has for you, and how your department's performance is measured—all so that you can invite your outside counsel to think about how to assist. The old adage is that "you don't know what you don't know." And your outside counsel will not know unless you tell them. Once they understand, they will desire to help. Together, with aligned objectives, you can ensure financial and efficiency targets are met, create predictability, ensure transparency back to the business team, and ultimately help ensure that the business believes it receives fair value for the costs incurred.<sup>132</sup>

#### *B. Mastering Your Chosen Knowledge Management Tools*

The net generation obtains so much content for free that it is hard to imagine that those expectations will stop at the company's doors. It's readily apparent why clients believe that the "value" of content is relatively low and that they should not pay for its creation—either because they believe it has already been created somewhere and only organizational deficiencies require its re-creation, or if it is newly created work, they believe the firm will be able to capture additional value by using it again for other clients.

132. See, e.g., *Elevator Pitch: How Can Value Based Fee Structures Help Us?*, ASS'N CORP. COUNSEL (Oct., 2010), <http://www.acc.com/valuechallenge/resources/upload/ACC-ElevatorPitchValueBasedFeeStructures.pdf>.

These are both fair points. Many firms are focused on centrally and digitally retaining all documents, but fewer have mastered the ability to organize, keep current, and make those documents readily available for reuse at additional profit for the firm.

Firms, and the lawyers in them, need to master these tools as if their lives depended on them. Their economic lives may. A few thoughts come to mind: (1) make sure your knowledge management system is robust and not merely a repository; (2) make it mandatory to populate your knowledge management system and keep it current; (3) make it equally mandatory to use it; (4) make its success a tangible part of performance reviews and compensation; (5) hire professional resources to help make your system sing; (6) benchmark the competition; and (7) measure, analyze, and continually improve your processes. This is one area where technology will march on, and firms will need to march along. Small firms might not be able to lead this parade,<sup>133</sup> but they need to be in it.

### C. *Mastering Document Management and Artificial Intelligence Tools*

A great opportunity exists for those associates and partners that master the new array of document management and review tools. Knowing which tool is right in which circumstance will be critical to capitalizing on new opportunities and making them profitable. Knowing whether to invest internally or outsource will be an important decision for each firm and for each matter.<sup>134</sup> I believe we are ethically obligated to stay current on technological

133. See generally MEREDITH WILLSON, *Seventy-Six Trombones*, on THE MUSIC MAN SOUNDTRACK (Warner Bros. 1962) ("Seventy-six trombones led the big parade."). I can imagine that the AmLaw 100 firms will be leading this parade, since knowledge management systems are expensive and smaller firms cannot afford trial and error. But waiting to determine a winning technology is not the same as watching the parade go by.

134. For law firms, as for clients, this now becomes a "make or buy" decision. Many firms are choosing to create legal process outsource operations and/or relocate those operations to lower cost jurisdictions in the United States or overseas. Recent reports cover Orrick's decision to locate certain services to Wheeling, West Virginia; Wilmer locating services to Dayton, Ohio; Allen & Overy locating services to Belfast, Northern Ireland; Baker McKenzie setting up an operation in Manila, Philippines; and so on. Lippe, *supra* note 51. All of this bodes well for the idea that large firms may purchase document management companies and diversify their product lines, or vice versa, if ABA non-lawyer investment rules change.

advancements,<sup>135</sup> just as we are obligated to stay current on substantive legal advancements.

To outside counsel, I would advise investing in expertise to help make these decisions. This is a skill set that can be outsourced for the smaller firm. But it is a different skill from what your IT function traditionally offers. Network among firms and clients to determine who has tried what applications in what kind of matters, and be candid with each other about which features worked well and which did not. This is one of those circumstances where the road to Abilene can be disastrous.<sup>136</sup> In order to enhance their products, product developers need quality information too, so share reactions and experiences with your vendors. To vendors, listen, listen, and then listen some more.<sup>137</sup> I am convinced that the limitations today are not as much technological as in the application of those technologies. Take to heart today's witticism that "there's an app for that" by listening and developing to the industry's known and anticipated needs. And also remember that the world did not think it needed Post-It<sup>TM</sup> notes. Your customers will not always know what they need.

To in-house teams, think about how to maximize overall system efficiency. Imagine that if all five hundred Fortune 500 companies specified the use of different platforms, overall system costs would skyrocket. For companies, too, this may be a prime area for outsourcing, which would allow the selection of appropriate tools by matter and avoid the force fitting of a matter into purchased tools. And listen to what your counsel have learned

135. See Joe Dysart, *A Discovery: Study Tech-Aided Review Before It's an Ethics Issue*, A.B.A. J. (July 1, 2012, 2:10 AM), [http://www.abajournal.com/magazine/article/a\\_discovery\\_study\\_tech-aided\\_review\\_before\\_its\\_an\\_ethics\\_issue/](http://www.abajournal.com/magazine/article/a_discovery_study_tech-aided_review_before_its_an_ethics_issue/) (recommending lawyers consult the on-line tool eDJ Tech Matrix, a free service offered by eDiscovery Journal).

136. See generally *Abilene Paradox*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Abilene\\_paradox](http://en.wikipedia.org/wiki/Abilene_paradox) (last modified Aug. 15, 2012) ("The Abilene paradox is a paradox in which a group of people collectively decide on a course of action that is counter to the preferences of any of the individuals in the group. It involves a common breakdown of group communication in which each member mistakenly believes that their own preferences are counter to the group's and, therefore, does not raise objections. A common phrase relating to the Abilene paradox is a desire to not 'rock the boat.'").

137. See Joe Dysart, *Mind Meld: How to Understand Legal Minds to Defeat Tech Fears*, A.B.A. J. (July 1, 2012, 12:30 AM), [http://www.abajournal.com/magazine/article/mind\\_meld\\_how\\_to\\_understand\\_legal\\_minds\\_to\\_defeat\\_tech\\_fears/](http://www.abajournal.com/magazine/article/mind_meld_how_to_understand_legal_minds_to_defeat_tech_fears/) (providing vendors with advice on how to successfully win over potential customers).

as they have used these tools. They may have a wider range of experiences than you do simply because of their exposure to multiple clients. You don't always get what you want, but sometimes you get just what you need.<sup>138</sup>

Within firms, everyone needs to be thinking about how to keep pace with technological change. To associates, grasp that this is a leadership opportunity. Step in and step up. Offer to teach your firm the ins and outs of the latest predictive coding technology, knowledge management software, or project management tools. You will have to master them to be able to teach them well.<sup>139</sup> And that will become a key building block of your success.<sup>140</sup> And mastering the technologies of the future becomes a cornerstone of mastering the finances of the legal industry.

*D. Master the Finances of Law—Especially Cost and Profitability Analysis—and Implement Cost-Improvement Programs*

To drive to market-valued pricing at profitable returns, everyone in the value chain needs to understand the finances of the industry and their particular business in it. This means firms need to better understand the relationships between cost, volume, and profits.<sup>141</sup>

If a firm is lucky enough to have an associate, partner, or staff member with an economics background, put that person to work researching and understanding industry economic trends. Every lawyer—and associates in particular—needs to understand business finance principles. Read business and economics articles, and then start with learning to read a profit-and-loss statement. Understand how companies report legal fees and legal matters. Equally important: understand each facet of your firm's financial existence. Besides acting like every penny spent is your own—because eventually it will be—understand the links between revenue, costs, and profit, and how a change in one affects the others. Develop

138. See generally THE ROLLING STONES, *You Can't Always Get What You Want, on LET IT BLEED* (Decca UK 1969) ("You can't always get what you want; But if you try sometimes, you just might find; You get what you need.").

139. See COVEY, *supra* note 127, at 237 (stating that one must understand to be understood).

140. See Bay, *supra* note 85 ("This is a tremendous opportunity for recent law school grads with an optic and penchant for math, statistics, and technology . . . . I see a clear path to the front of the line in many litigation departments." (quoting David Cowen, Managing Partner of The Cowen Group)).

141. See *infra* Part III.



the ability to do sharp cost/benefit analysis on proposed next steps in a matter. Every one of your clients does this mental calculation many times each day. Train yourself first to do it as it relates to your own business, then learn to apply those skills to the work you do for your clients. Before long, you will begin to talk your client's financial language.

The overall picture matters but so does the detail. Each person in the value chain needs to understand the cost implications of his or her decisions. Lawyers need to know the production costs of their work. Then they need to go one step further and evaluate those costs to assess what could have been done differently to be more efficient. Make those insights actionable by setting concrete efficiency goals. Compare results within the team.<sup>142</sup> The objective is to improve the firm's performance over time, to be more efficient, and therefore more cost-competitive. The most effective tactics will become clear once the data is available and analyzed. One impediment is that many firms are not able to track costs or profitability by matter, taking into account all costs related to the project. That needs to change.<sup>143</sup> Coming from business, it is almost impossible for me to imagine that most firms do not do unit-cost analysis.<sup>144</sup> I cannot imagine running a business without it and surely cannot imagine pricing offerings at market value without it.<sup>145</sup>

But to be fair, clients need to do the same thing. The popular legal press is full of client criticisms of firms' billing practices and their perceived—or real—lack of efficiency, and it is nearly silent

142. This may require an important cultural shift with the firm—a move away from competitive behaviors to collaborative behaviors. See *infra* Part III.D (discussing measurement systems).

143. See, e.g., Cassens Weiss, *supra* note 69.

144. Some do. Seyfarth Shaw reports it is collecting data on the amount of time it takes to perform specific tasks to help price its legal services, using in addition to its own data, data provided by e-billing vendor management firm TyMetrix, which has been collecting data on billings and legal matters from its clients since 2009. *Id.* How many other firms are working to capture this level of data—what I would characterize as unit-cost data equivalent to what companies collect on manufacturing operations—is unclear.

145. See *infra* Part III.A.1 (discussing unit-cost analysis). While my focus is on the use of business pricing tools to set prices, others have written on the need to adopt classic business tools for running their firms. I agree, although not with the notion that those metrics should be built with a reference to billable hours. See, e.g., Arthur G. Greene, *The New Normal: Restoring Profitability*, LAW PRAC. MAG., July–Aug. 2012, at 28, 28, available at [http://www.americanbar.org/publications/law\\_practice\\_magazine/2012/july-august/the-new-normal-restoring-profitability.html](http://www.americanbar.org/publications/law_practice_magazine/2012/july-august/the-new-normal-restoring-profitability.html).

on firms' criticisms of client practices. Of course, this is a clear indication of where power in the purchasing relationship resides; criticizing the client would be like "looking a gift horse in the mouth."<sup>146</sup> But value can be derived at many places in the work stream, and clients' willingness to listen carefully to what their firms tell them about the clients' own processes and performance can create significant cost-reduction opportunities that will yield enormous value to the client company. Having been on both sides, I know this to be true. The problem, of course, is that because only a few hundred highly powerful purchasers and their staffs source the majority of legal services, any criticism directed to them runs the real risk of jeopardizing the relationship and future referrals. This is one area for potential efficiencies where in-house lawyers simply must take the lead and seek out firms' ideas for improvement of their in-house processes and performance, and they must do it in a way that will yield honest and useful feedback.

The joint goal is increased efficiency, which will translate into increased savings. One emotionally neutral approach, if your company uses Six Sigma methods, is to undertake joint Six Sigma projects.<sup>147</sup> Project-scoping techniques require the project team to review all inputs and outputs in a process—regardless of who delivers them—and then ensure that the improvement plans focus on those few opportunities that will yield most of the efficiency improvements. "The secret is in trust, sharing and statistics."<sup>148</sup>

In the end, to be able to make a profit at market-based prices, firms must be able to analyze historical financial data to implement cost reduction programs and to accurately predict their costs of future projects. That means hiring the right people, deploying the appropriate tools, and training their employees to understand the value of tracking the data and keeping it current and accurate. Of course, this deep understanding of costs and profits, coupled with the financial analysis tools used in business, also enables effective reporting of the "business aspects" of the matter to the client in the client's language.

146. I always wondered the source of that old adage. Apparently, you assess a horse's age by looking at its teeth, and if someone gives you a horse, you don't want to appear ungrateful by assessing how old (and therefore valuable) the gift is. *Don't Look a Gift Horse in the Mouth*, PHRASES.ORG.UK, <http://www.phrases.org.uk/meanings/dont-look-a-gift-horse-in-the-mouth.html> (last visited Sept. 4, 2012).

147. See generally PETER S. PANDE ET AL., *THE SIX SIGMA WAY* (McGraw-Hill 2000).

148. Zahorsky, *supra* note 2, at 41.

*E. Mastering the Art and Science of Project Management*

Books have been written on legal project management.<sup>149</sup> Whether you imagine legal project management as analogous to the methods used by construction industry general contractors to complete a project on time, or more like the analogy of being a symphony conductor, today's legal world requires first-rate project management skills.<sup>150</sup>

In teaching the concept of project management, I often use the analogy of Thanksgiving dinner. Growing up, I watched the women in my family plan and execute a feast—each step choreographed carefully to ensure that every dish was ready to be served virtually at the same instant. First my grandmother and then my mother directed the work of the rest of us, all weaving around each other in the tiniest of kitchens. It never failed; everything was perfectly done exactly at the right time. Now that's project management!

The who, what, when, where, and how of each element of work needs to be organized; tied together into a process map; and managed to completion on time, in full, and at the cost agreed. The project is legal, but the skills and the tools are the same. Just as law schools and firms teach the use of research tools, they should invest in and teach the use of project management tools. Project management tools used well—and there are many choices—have the silver lining of being the best of all communication tools: keeping everyone on a large team organized, efficient, and timely. I favor a concept called “critical path method of scheduling,” which maps all activities and then notes those that are on the “critical path,” meaning that a delay in that element delays the entire project.<sup>151</sup> We all know that delay adds costs, but we might not know when we are on the critical path and causing someone else's delay. This method creates an objective and non-emotional way to discuss what will happen next, what the deadlines are, who is

149. A search on Amazon.com for “legal project management” yields more than 200 options. Books on Legal Project Management, AMAZON, <http://www.amazon.com> (search “legal project management”).

150. See SUSSKIND, *supra* note 4, at 50–51; Henderson, *supra* note 15, at 384; Patrick J. Lamb, *A Trusted Adviser In the New Normal Must Be Like a Symphony Conductor*, A.B.A. J. (May 8, 2012, 9:24 AM), [http://www.abajournal.com/legalrebels/article/on\\_being\\_a\\_trusted\\_adviser\\_in\\_the\\_new\\_normal/](http://www.abajournal.com/legalrebels/article/on_being_a_trusted_adviser_in_the_new_normal/).

151. See *Critical Path Method*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Critical\\_path\\_method](http://en.wikipedia.org/wiki/Critical_path_method) (last modified Aug. 10, 2012, 10:39 AM).

responsible, and the consequences of a missed deadline. It helps avoid surprises, fosters constructive communications, and allows people to work ahead when their time becomes available.

Of course, project mapping tools can be expensive and they are not static, requiring the investment of time and resources to keep them updated and useful. But clients and law firms alike, if they measure and track costs of production, will quickly see the financial benefits of good project management tools and will willingly pay to support their use. Clients already are familiar with these tools because their business clients use them regularly. In-house lawyers live each and every day on some project's critical path. Law firms need to master the same skills and become best-in-class project managers.

*F. Break Down Borders: Become Global Thinkers and Virtual Teamers*

Even though solutions might be local, the problems are becoming more global. Become that hard-to-find integrator. Start by thinking globally about your specialty. If you are an antitrust expert, learn competition law. If you are a transactional lawyer, develop the expertise to do international transactions. If you are a litigator, develop the expertise to collect documents and interview and depose witnesses internationally. Assign someone the job of mastering other countries' privacy laws.<sup>152</sup> If you are a small firm, add an international practitioner to your team. Build an international network so you can quickly get an answer to any question, anywhere. Know the international operations of each of your clients and think about how you can add value, and then promote that value to them in their language.

Whether it is a group of small firms teaming together to make a proposal for a project too large or risky for any one of them, or a single firm that needs lawyers on the team from multiple countries, virtual teaming skills and collaboration tools are essential. For law firms, these include cultural awareness, language capabilities, travel-savvy workers, remote-computing skills, document-sharing software, and other remote-collaboration tools that allow web-conferencing, web-based editing of documents, and—once again—

152. See Debra Cassens Weiss, *More Big Law Firms Add Internet and Privacy Law Practices*, A.B.A. J. (June 20, 2012, 5:15 AM), [http://www.abajournal.com/news/article/more\\_biglaw\\_firms\\_add\\_internet\\_and\\_privacy\\_law\\_practices/](http://www.abajournal.com/news/article/more_biglaw_firms_add_internet_and_privacy_law_practices/) (“[E]very firm in the country has or wants to have a privacy practice . . .” (quoting Stuart Ingis, Co-Chairman of the Privacy and Data Security practice at Venable)).

excellent project management tools and skills. It also requires humility—a recognition that the right answer, the one your client needs, is in someone else’s head, perhaps in a remote country and not in your preferred language. It remains your job to find it and integrate it into the problem-solving process, and all at a reasonable cost reflective of its value. For vendors, it means solving document translation issues and perfecting collaboration tools so that there are cost-effective ways of sharing information and documents across languages and geography. For in-house counsel, it means openness to new approaches, experimentation, and patience as we all learn how to be global thinkers and virtual teamers.

Become that sought-after integrator by becoming a global thinker and a master at virtual teaming. And become the catalyst for change in your organization.

G. “*You Know It Don’t Come Easy*”<sup>153</sup>: *Master Change Management Skills*

Change doesn’t happen just because we say we want it. It is hard work, and there are change management practices a firm needs to deploy in order to facilitate lasting change. As humans, it’s easy to be comfortable with what we know and how we’ve done things in the past. These are well-engrained habits or organizational routines. Comfort with the status quo applies to firms and clients alike. Recall that sixty percent of chief legal officers are pushing non-hourly fee structures, but that means, then, that forty percent prefer the status quo.

A law firm’s executives need to persuade each other, then the firm’s members, and finally, some (but not all) of its clients.<sup>154</sup> Driving real change requires driving it throughout the organization, measuring results, closing gaps, and iterating your process until it is second nature—a new habit. To become a habit, we are taught something needs to be repeated twenty-one times.<sup>155</sup> Persistence and patience on both the part of

153. See generally RINGO STARR, *It Don’t Come Easy* (Apple Records 1971).

154. Debra Cassens Weiss, *Don’t Underestimate Lawyers’ Resistance to Change, Seyfarth Shaw Chairman Says*, A.B.A. J. (May 8, 2012, 6:52 AM), [http://www.abajournal.com/mobile/article/dont\\_underestimate\\_lawyers\\_resistance\\_to\\_change\\_seyfarth\\_shaw\\_chairman\\_says](http://www.abajournal.com/mobile/article/dont_underestimate_lawyers_resistance_to_change_seyfarth_shaw_chairman_says).

155. See Jessica Cassity, *Can You Build a Fitness Habit in 21 Days?*, HUFFINGTON POST (Jan. 30, 2012, 6:08 AM), [http://www.huffingtonpost.com/jessica-cassity/exercise\\_b\\_1237470.html](http://www.huffingtonpost.com/jessica-cassity/exercise_b_1237470.html). The theory appears to have evolved from a study conducted by plastic surgeon Maxwell Maltz. *Id.* The Internet is replete

firms and clients are required to make and sustain the new processes that hold the promise of significant efficiency gains. Managing this change is itself a skill that needs mastering.

### III. MAKING THE SHARP SHIFT FROM PRICING AT COST-PLUS TO MARKET-VALUED, PROFIT-DRIVEN PRICING

Analysis of the drivers causing an evolution in the legal profession makes the case that it is necessary to change with the times. In order to successfully shift to market-valued pricing and away from hourly rates, firms need to master and deploy the seven non-legal skills discussed. The last piece of the puzzle is to apply basic business pricing tools and techniques to determine and negotiate market-valued pricing. It sounds so easy.<sup>156</sup> Of course, it is easier to say than do.

At a high level there are really only three considerations: price, quality, and service. These considerations form the “PQS”<sup>157</sup> of the legal business world. This section focuses primarily on the price element but starts with some preliminary comments to help frame the discussion.

First, much of what has been written focuses on maximizing efficiency,<sup>158</sup> which is a critical productivity measure, but efficiency

---

with self-help websites offering to help anyone change a habit in twenty-one days. See, e.g., 21 HABIT <http://www.21habit.com> (last visited Aug. 26, 2012); HABITFORGE, <http://www.habitforge.com> (last visited Aug. 26, 2012). See generally Thomas S. Clay & Daniel J. DiLucchio, *Alternative Fee Arrangements: The Time Has Finally Come*, REP. LEGAL MGMT., Apr. 2010, at 2, 5, available at [http://www.altmanweil.com/dir\\_docs/resource/c4ef6aaa-cd19-4af4-a041-a2edc968d050\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/c4ef6aaa-cd19-4af4-a041-a2edc968d050_document.pdf) (discussing the importance of change management and reference the change management principles in John Kotter's book *Leading Change*); CHARLES DUHIGG, *THE POWER OF HABIT* (2012) (discussing how organizations can create new habits).

156. See generally THE SOUNDS, *It's So Easy, on SOMETHING TO DIE FOR* (Side One Dummy Records 2011) (“It's so easy when you know how it's done; You've gotta seize the moment before it's gone.”).

157. This is a word play on “CQS”—customer quality specification—a phrase used in business to document the “voice of the customer” as to the specific attributes of the component, service, or product being purchased in order to measure performance against a customer developed specification. It also can be an acronym for cost, quality, and service. In both definitions are business lessons that lawyers can apply to the provision of legal services.

158. See, for example, Frederick J. Esposito, Jr., *The New Normal: Alternative Fee Arrangements and Project Management for Lawyers*, LAW PRAC. MAG., Nov-Dec. 2011, at 48, 49–50, available at [http://www.americanbar.org/publications/law\\_practice\\_magazine/2011/november\\_december/the\\_new\\_normal.html](http://www.americanbar.org/publications/law_practice_magazine/2011/november_december/the_new_normal.html), in which increased efficiency is discussed as one of the primary means of achieving

is only one measure of performance and not a destination itself. This is obvious when one contemplates that if you need to travel to Austin, Texas, an efficiently executed trip to Austin, Minnesota is worthless.<sup>159</sup> The strategy should be to gain a competitive advantage by profitably employing market-valued pricing. Efficient implementation of the underlying project helps achieve this profitably objective as well as the corresponding client satisfaction objective.

Second, although the focus of this article is on market-valued pricing, or the “P” of PQS, a few words about the “Q” and “S” are important. The quality of work remains as important as ever. How a client defines quality today, however, may be significantly different from in the past. Today’s definition may account for changing business operations, a more global market place, and ever-compressed time frames in which to identify implementable business solutions. Well-done work delivered after the business window of opportunity has closed fails to meet the business’s needs. Full stop. “Perfect” quality may not be needed for many business matters; in fact, it may be inefficient. The Pareto principle applies to legal work, too. Imagine that if twenty percent of the effort yields sufficient analysis on which to base a reasoned risk assessment, then knowing to stop at that point signals that you understand today’s definition of quality. Quality also connotes pragmatism and practicality—meaning that the legal work accounts for both legal and business issues, and the proffered solution is one that is workable and will integrate into existing business processes while still appropriately addressing the legal issues at hand.

Third, all aspects of service matter, not only timeliness. Responsiveness matters. Business acumen matters. Interpersonal skills matter. And value-added service features, such as knowledge management systems, may be what differentiates one firm from another. However, one caution: exemplary service does not equate

---

profitable alternative fee arrangements. The author identifies the following tactics for helping to improving efficiency: (1) a focus on historical time investments; (2) improved time management; (3) adherence to budgets and time-tracking procedures; (4) keeping track of the evolution of alternative fee arrangement systems; and (5) understanding profitability. *Id.* at 50. The author goes on to question how many firms have actually profitably deployed alternative fee arrangements and discusses many of the mistakes firms repeat including failing to use alternative fee arrangements, failing to deploy a change order process, and susceptibility to client intimidation when there is a resistance to pricing changes. *Id.*

159. See Dysart, *supra* note 137.

with telling the client what it wants to hear. One important component of service is candor.<sup>160</sup> To provide less deprives the client of the lawyer's best thinking and runs the risk of inefficiencies by avoiding tough issues and setting the project on the wrong track. In-house lawyers need to understand that the dynamics of today's market, where supply exceeds demand, can have the unintended consequence of decreasing candor because firms fear losing a client. Collectively, we all need to have the courage and backbone to be candid. Without it, the client loses.

Turning now to the "P" in PQS—the issue is how to develop pricing that reflects a market-valued approach rather than an hourly rate or cost plus profit approach. There are many factors that go into setting price, and each firm should develop its own system of pricing that considers them all. Businesses do this every day. Firms can, too. The techniques and tools are the same.

A. *First, "Get Your Act Together"*<sup>161</sup>

The first question is not, "what should the price be?" It should be, "have I assessed all the considerations that . . . determine the correct price?"<sup>162</sup> Before you take the leap and offer a price that is not based on hourly rates, you need information (data that has been analyzed and useful information extracted) and a firm profitability and pricing strategy. Consider a number of factors, including:

- your costs of production (this is *not* to be confused with the notion of hours times rates that is typically used to price legal

160. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983) ("In representing a client, a lawyer shall . . . render candid advice."). What distinguishes the legal profession from some other service providers is our professional obligation to represent the client—the company—and not necessarily those company employees that retain us.

161. "You better get your act together, if you ever wanna take it on the road, you can't sit around, or the bad times are gonna get to you, and you're never gonna see it through." SUPERTRAMP, *Get Your Act Together*, on SOME THINGS NEVER CHANGE (Oxygen Records 1997).

162. Robert J. Dolan, *How Do You Know When the Price is Right?*, HARV. BUS. REV., Sept.–Oct. 1995, at 174. Dolan posits eight considerations to apply to determining the "right price": (1) the value customer places on the product, (2) whether different customers perceive value differently, (3) customer price sensitivity, (4) determining the optimal price structure, (5) considerations of competitive reaction, (6) monitoring pricing at the transaction level, (7) considering customer's emotional response, and (8) analyzing the revenue versus cost to serve the customer. *Id.* at 175–83.



matters);

- your firm's revenue and profit expectations, and whether your pricing strategy is to increase revenue, increase profits, expand market share, or some combination of metrics;<sup>163</sup>
- the market value of the services from the client's perspective; and
- the prices offered by others for the same or analogous services.

With useful information, you are in a position to apply common business tools and analysis to help determine a market-valued price. This is not new news, but one does wonder why so few firms have developed disciplined processes to apply business-pricing techniques to setting prices.<sup>164</sup>

### 1. *Know Your Costs*

Start with costs, not because they should determine price, but because you cannot assess whether your firm can afford to do a market-valued project without knowing the impact of that pricing on your firm's profitability, and whether there are any specific cost-control strategies that can be deployed against a particular project to make it sufficiently profitable to be able to engage on it.

Obviously, a well-run firm has ongoing programs to decrease its costs of production. But I suspect that most do not bring to bear the concept of unit-cost accounting that businesses use to calculate their costs of production. Take one recurring task—a deposition. Do you know what it costs your firm, on average, to do a deposition? Do you know the median cost, and the high and low costs? Can you articulate the reasons for and show the financial analysis around variances against the mean or median? Does that information provide ideas for cost-reduction programs? If there are outliers that are unusually low, do you know why? Do they suggest best practices to replicate throughout the firm? Besides the cost of the attorneys and other staff involved, do you understand

163. Elizabeth Wasserman, *How to Price Your Products*, INC.COM (Feb. 1, 2010), <http://www.inc.com/guides/price-your-products.html>.

164. See Catherine Dunn, *ACC Reveals Its List of In-House Value Champions*, LAW.COM (June 22, 2012), [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202560378765&ACC\\_Reveals\\_Its\\_List\\_of\\_InHouse\\_Value\\_Champions](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202560378765&ACC_Reveals_Its_List_of_InHouse_Value_Champions) (discussing ACC's announcement of its inaugural class of ACC value champions—five in-house departments and seven pairings of in-house teams with outside firms). “What all the winners have in common . . . is that they're applying commonsense management principles and adapting techniques used on the business side to legal department spend.” *Id.* (internal quotations omitted).

overhead and other related costs for such projects? Not everything lawyers do is customized; lawyers must understand the cost structure of repeatable tasks.

While I rarely hear lawyers speak this language, product and production managers in companies do so all the time. I believe they have much to teach us. Another business truism is that you cannot cost-cut your way to success. While arguably true, this is not the same concept as studying past performance to wring more efficiency out of the system. Until you know what tasks actually cost, you cannot know for sure what tasks should trigger a “make or buy” decision, what cost-reduction programs you can deploy, and whether you will still make a profit if you retain some lower-value work in the firm, and you cannot price your offering to make a profit other than by instinct or chance.

To be successful at unit-cost analysis you need three things: (1) the information—raw data analyzed into useful information, (2) a good analyst to do that analysis for you, and (3) a willingness to believe and act on the data (without fear or favor). To have useful data, information creation and capture is critical. A law firm’s ability to deliver cost-effective services at acceptable profit margins, even when the value of the work is low, will be driven in large part by the firm’s ability to effectively and efficiently access and use its financial data.<sup>165</sup> Analyzing by ABA billing codes, if attorneys reasonably adhere to their use, creates a starting point for the analysis. But it will only provide time associated with tasks and not costs associated with tasks. Once you engage in aggressive financial analysis, you will understand the information you wished you had collected and start collecting it. And when you make a market-valued price proposal for a client, you will want to track costs so that you can calculate profits and learn from your successes and failures. This collection and analysis of useful data needs to become a firm-wide habit.

Firms should consider hiring a unit-cost analyst from the manufacturing industry. Most of us don’t do our own taxes, why should we do our own financial analyses? These professionals are neither financial managers nor bookkeepers. These are people whose profession it is to determine the entire cost of producing something and then to identify better ways of producing the same

---

165. See TOBY BROWN, CASE STUDY: THE USE OF KM IN ESTABLISHING FIXED FEE PRICING 5 (2010), available at [http://collegeoflpm.org/wp-content/uploads/2012/01/2011\\_Defining-Value.AFA-KM-Case-Study-Toby-Brown-Oct-10.pdf](http://collegeoflpm.org/wp-content/uploads/2012/01/2011_Defining-Value.AFA-KM-Case-Study-Toby-Brown-Oct-10.pdf).

thing at the same quality but for a lower cost. When a firm finds it needs to project costs on a project or make its own “make or buy” decision, good data takes away much of the guess work. Reducing guesswork reduces risk. Hire good people (on a contract basis, perhaps) and discover your complete cost structure.

Financial and productivity data invariably generate emotional responses. For this information to be useful, people must believe it and be willing to act on it. This does not mean that the information should not be challenged, analyzed, and explanations sought and offered for deviations from the mean or median. In fact, it is from those explanations that cost-savings projects and best practices can be discerned. To be successful, this analysis needs to be done in a nonjudgmental way. Absent a safe process, however, stakeholders will not share data or ideas, and they will not believe the numbers or act on them.

Two stories illustrate this critical need for a safe process. The first was an experience years ago in a management-training program. Our groups were instructed to individually complete an exercise and then complete the same exercise as a group. Assuming that everyone communicated well, the purpose of the exercise and the expectation was that the group result would be better than any individual’s result because the group would have the benefit of every individual’s best thinking. Contrary to expectations, our group’s result was worse than one team member’s individual result. She was a quiet type—one who observed and never spoke in the group meeting. Yet she had understood something critically important about the exercise—and chose not to share it. The lesson was twofold. Hoarding a good idea only increases the overall chance of team failure; individually, we are obliged to share. But also, unless a group creates an environment conducive to sharing, it runs the risk of losing the benefit of the great solutions not shared.

The second story comes from Charles Duhigg, in his book, *The Power of Habit: Why We Do What We Do in Life and Business*. He describes how a production employee at Alcoa had been telling many of his friends about a good idea he had for efficiency improvements at the plant where he worked. He chose not to tell his management because the culture was not one that allowed challenging those in power. After a change in management many years later; he shared his idea. The catalyst for his change of heart was a request from management that employees share ideas to

improve worker safety. He decided that since safety ideas were now welcome, he would take the risk and also volunteer his productivity idea. It was a blockbuster idea.<sup>166</sup>

Both of these examples demonstrate that the best ideas can come from anywhere in an organization. To capture them and reap their benefits, the environment must be a safe, nonjudgmental environment for sharing. In-house counsel can also take to heart this lesson: to capture the best ideas from the firms that do your work, create an environment safe for sharing. For firms and companies alike, the good ideas that will be generated will lead to efficiency improvements. Breakthrough insights will come.

Good data coupled with an environment conducive to sharing efficiency-improvement ideas will allow clear visibility into costs and cost-savings opportunities, which firms will be able to implement because their members believe the data and are willing to act on it. This is a cornerstone breakthrough to reducing the risks associated with non-hourly rate structures and will help firms assure that they still will make appropriate profits from such projects.

## 2. *Know Your Firm's Financial Needs*

Visibility into costs and cost-savings opportunities allows an assessment of whether proposed project pricing achieves or undermines the firm's revenue, profit, and market share targets. Each firm must determine the profits it needs for its ongoing success. I am not talking about greed; nor am I talking about mere survival. Every firm's financial plan assumes certain revenue, profit, and volume metrics. By understanding them, you can consider how your project impacts them. After all, nonprofitable law firms soon will be out of business.

Consider these financial facts. "[F]or a company with 8% profit margins, a 1% improvement in price realization assuming a steady unit sales volume would boost the company's margin dollars by 12.5%."<sup>167</sup> Or this: for a company with average economics, improving unit volume by 1% yields a 3.3% increase in operating profit, assuming no decrease in price. In contrast, a 1% increase in price, assuming no loss of volume, increases operating profit by 11.1%. "Improvements in price typically have three to four times

166. DUHIGG, *supra* note 155, at 11.

167. Dolan, *supra* note 162, at 174.

the effect on profitability as proportionate increases in volume.”<sup>168</sup> For these reasons, even one small step toward better understanding the impact of pricing on profitability would be worth every firm’s effort. Many commentators have identified an “ongoing shift towards a profit-margin business model for firms.”<sup>169</sup> Understanding what and how actions impact profits is the first step in embracing this new model.

*B. Defining Value: It Is in the Eyes of the Beholder*

Now that you have analyzed your cost structure, understand how choices affect profitability and the firm’s cost and profit targets, you have your own act together. The model strategy contemplates pricing services at fair value; this is the next and most important step from the client’s perspective. The key is to find that price that reflects a market-validated value for your services—what I’ve called “market-valued pricing.” Clients fear that they will pay too much and the firm will gain a windfall; the firm fears that it will take a beating on the project. Every in-house counsel has tales of being billed unfairly; every outside lawyer has tales they would never tell their clients of other clients taking advantage of alternative fee arrangements. Each fears the other will act only for its own interests. Trust and open dialogue seem to be rare commodities.<sup>170</sup> Somewhere between these alternate realities lives that “right price.”

168. Michael V. Marn & Robert L. Rosiello, *Managing Price, Gaining Profit*, HARV. BUS. REV., Sept.–Oct. 1992, at 84, 84.

169. TOBY BROWN, THE VALUE IN VALUE BILLING FOR LAW FIRMS 1 (Oct. 2011), available at [http://collegeoflpm.org/wp-content/uploads/2012/01/2011\\_Defining-Value-The-Value-in-Value-Billing-for-Law-Firms.Toby-Brown.pdf](http://collegeoflpm.org/wp-content/uploads/2012/01/2011_Defining-Value-The-Value-in-Value-Billing-for-Law-Firms.Toby-Brown.pdf).

170. See Jessie Nelman, *A Little Trust Can Go a Long Way Toward Saving the Billable Hour*, 23 GEO. J. LEGAL ETHICS 717, 718 (2010) (arguing that the dissatisfaction with the billable hour as a business model has at its root “a common underlying element that is the source of client aversion to the billable hour: mistrust”). Nelman further argues that alternative billing models do not address this underlying root cause problem, with some forms of alternative structures even exacerbating them, and that the preferred solution would be changes to Rule 1.5 of the Model Rules of Professional Conduct and better education and training of all lawyers. *Id.* at 731–32.

While I agree that mistrust and perceived abuse underlie much of the dissatisfaction with the billable hour, my proposal to move away from it to profit-based, market-valued pricing is based on my belief that the legal profession, like any other industry, should price using normal, well-accepted pricing methodologies. In the construction industry, as an example, time and materials plus profit (or “cost plus” as it’s called) is one method of pricing, but it is not

### 1. *Know Your Client*

The most important factor is to know your client's objectives and the project's impact on the business. A firm needs to gather specific information about what services the client needs, how its employees attach value to them, and why.<sup>171</sup> Consider the following questions, and listen carefully to how the client articulates its needs.

- What is the client's business objective? I recall once a discussion with my outside counsel along the following lines: "My clients see no upside to litigation unless they are the plaintiff and that's not often. There are things they care about like reputation, the principle at stake in the case, and spill-over effects. But brilliant 'lawyering' that prevents these downside risks only allows them to return to the business status quo that existed before this company sued us, so let's keep these business realities in mind as we plan and work this case." Know the client's business objective. Is the object to win at all costs or to minimize business disruption? Or is it to settle for as small an amount as possible or to stand on principle?
- What are the financial implications of the matter to the business? How do fees affect business operations? What outcomes have acceptable business ramifications? What outcomes would cause real business damage? Are there considerations around timing that matter to the project? For example, it may be better for the bulk of discovery to occur after the first of the year when a budget can be established in the business cycle. Or does the deal lose its business value if it is not completed by a certain date or before a competitor enters the market? Does it matter whether the case settles before the end of the current fiscal year? Would monthly fixed-amount bills allow the business to better manage the costs of litigation? These financial implications vary by client but also by business within a client organization.
- Probe past history and decision-making styles. Does this business take an aggressive stand early but inevitably settle? Or has this company had a history of taking matters through trial on principle? Are business decisions made quickly with

---

preferred for large complex projects because of the belief that the incentives in a cost plus profit model do not align with efficiencies. Law is no different.

171. *Id.*

imperfect data, or do decision makers need a fulsome understanding of the facts to make a decision?

- Then ask all the same questions from the perspective of the legal department. Some lawyers may not appreciate that the business unit and the legal department have independent budgetary considerations, political considerations, and other objectives. And while those interests generally align, they may not fully align. Awareness allows tailoring to the specific needs of each. For example, the business may be under budget in the operative calendar year but the legal department's budget is over. That's an important issue to understand and help solve for both the business and the legal department.
- Ask how this client defines quality. Is this client particularly quality driven and willing to pay for a quality difference? Does this client perceive that your firm offers that quality difference? Or do you offer the same quality at a lower cost?<sup>172</sup>
- The firm should also consider exploring whether this client perceives value or derives value differently from others. Will the work product have value beyond this one matter? Will this client use the work product differently from other clients? Does it place a premium on continuity of representation? Certainty of costs? Consistent treatment across similar matters? If so, why? Think about what these aspects of the case might be worth to the client and be prepared to discuss how you and your firm can deliver these value components most cost effectively.
- Ask if this client is particularly price sensitive? If so, why?<sup>173</sup>

172. Dolan, *supra* note 162, at 175–76. Dolan uses two simple examples to demonstrate this point. *Id.* In the first, a drug which is superior to the current market leader is priced at a premium to the market leading product even though a cost plus profit model would have yielded a price lower than the market leader. *Id.* Performance characteristics allowed the new drug to supplant the market-leading drug even at higher prices. *Id.* In contrast, even though a utility had a superior product to offer, customers did not perceive value in superior performance, and the utility was forced to price at the prevailing market price. *Id.* It used its superior performance to differentiate itself from its competitors and to resist price down pressures. *Id.*

173. Dolan indicates that price sensitivity increases when the end user bears the cost as opposed to a third party; when the cost represents a substantial portion of the customer's total expenditures; if the purchaser needs to resell your product into a competitive market place; if a purchaser is able to readily judge quality without using price as an indicator; when a purchaser is able to easily shop around and assess the relative performance and price alternatives; the purchaser has plenty of time to do that shopping around; there are low switching costs; products

- If your client can perform some or all of the contemplated services in-house, it is important to understand and consider the client's internal "make or buy" decision. Is it purely a cost analysis? Are there resource constraints requiring external assistance? Do they need emergency coverage? The internal costs of a "make or buy" decision vary depending on the answers to these questions.
- Will the internal team be working substantively on the matter or only managing others' work? Assess how important they view your ability to work well with in-house teams. Explain, using specific examples, how your firm places value on the in-house team's experience and how those resources will be captured in your work plans.

These scoping questions are less about the legal substance of the matter than about the impact of the matter on the client. Gathering this information allows the firm and law department to tailor a particular project to the client's unique situation. Of course, you also need to scope the substantive work in your discussions,<sup>174</sup> but start with the impact on the client and then move to the substance of the representation. Good tools to capture market research, customer research, and other relevant information are also important. But nothing replaces the information learned through authentic personal relationships based on trust and sharing. To firms, I would say: ask and then listen carefully. To in-house lawyers, I would say: share candidly. You hold the key to avoiding a zero-sum game by taking the time to share both substantive and business information and concerns.

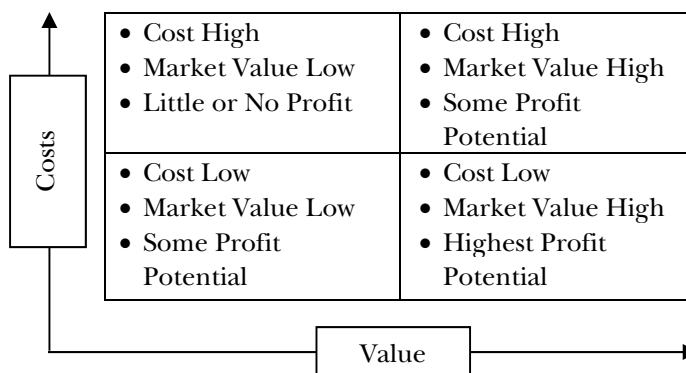
Putting these first three elements together allows you to begin to identify possible arrangements that allow both the client and the firm to benefit. Knowing your own costs, the clients' value assessment, and your firm's financial goals, allows you to think about matters in terms of this "four blocker".

---

and services are easy to compare; there is little differentiation among offerings; and relationships and reputation of the provider are not important. *Id.* at 178–80. Not all these factors apply to legal services, but some do. And not all apply equally to all clients or matters.

174. See discussion, *infra* Part III.C.1.





The firm can be profitable in all four circumstances provided it knows into which quadrant the various components of the project fall, and it has a strategy for pricing those components profitably. For example, in the upper left quadrant, where costs are high and market value low, pricing will be at very competitive rates. A firm's strategy may be to develop an alliance with a service provider to address some portion of that work while focusing its own work on supervising that service provider and other strategy, advocacy, and analysis components that have more value and fall on the right-hand side of the chart, with special focus on the lower-right quadrant.<sup>175</sup> As tasks are deconstructed into components with differing profit potential, having different pricing strategies by component is critical to profitability. Careful analysis allows a firm to identify profitable opportunities and to carefully manage those with less profit potential.

## 2. Consider Factors Supporting a Premium

You also want to consider whether there is something about your offering that supports a premium, such as: (1) a unique attribute or specialization that is in scarce supply, (2) better quality that warrants a premium, (3) reputation or brand awareness that matters in the context of the project and that would support a premium,<sup>176</sup> (4) the ability to respond in a certain time frame, or

175. Lippe, *supra* note 51.

176. See Amanda Bransford, *GCs Know Elite Law Firms Don't Come Cheap*, LAW360 (June 22, 2012), <http://www.law360.com/articles/353074> ("Clients believe what they receive [from the top-ranked firms in the survey] is worth the premium." (quoting Michael Rynowecer, BTI Consulting Group)).

(5) the ability to respond with additional service elements that others cannot offer. There are others to be sure. Of course, if you believe a premium is appropriate, you need to be able to articulate why the extra value is worth extra price and do so in your client's language.<sup>177</sup>

### 3. *Consider Factors Supporting an Additional Discount*

Likewise, you need to consider whether there is something about your offering that supports an added discount, such as: (1) if the commoditization of the offering is looming; (2) there is a quality differential that should be accounted for in the price; (3) potential substitutes create indirect competition and add enough price pressure to require a response; (4) this is a foot in the door with a potential new, large volume client;<sup>178</sup> (5) this client is particularly price sensitive; or (6) the matter is highly sought after and unusually competitive. As with a potential premium, you need to be able to articulate that you are taking a discount and your reasoning for it in the client's language. This will prevent the assumption that the discount will apply no matter the circumstances.

I recall a situation in which a discount was offered on the basis that the client would provide increased business. Time passed, people left their positions, and the client's institutional memory of the purpose behind that additional discount faded. The anticipated additional business did not materialize, but the client continued to expect the discount. Ensuring that clients understand the reasons discounts are provided, their duration, and any contingencies, are important to creating profitable engagements.

### 4. *Consider Whether Project Risks Fairly Affect Price*

Every project has risks. Once you believe you have a "fair price" in mind, consider whether identifiable risks to the project

177. One wonders whether brand name law firms will adopt a classic business strategy of private labeling outsourced process work in order to charge the premium differential associated with the law firm brand.

178. But increasing volume does not necessarily lead to increasing profits. "Loss leader" work may only lead to more of the same non-profitable work; it can become a dangerous spiral. See Roy Ginsburg, *Lawyers: Beware Low Billing Rates*, LAWYERIST.COM (May 2, 2012), <http://lawyerist.com/lawyers-beware-low-billing-rates/>.

should be reflected in that price. Risks come in many flavors: there are those that are external and outside the parties' control, there are those that relate to the client or other team members and are in their control but not the firm's, and there are those internal risks that the firm controls. Each should be considered and the impact on pricing assessed.

*a. External Risks*

Consider external risks that are out of the firm's control: issues such as crazy tactics employed by opposing counsel, changes in law or precedent, and so on. Nearly everyone has a story about a case that took an unexpected turn. Some external risks might be managed best by exit strategies or a change order process, others by adding a margin of safety to the proposed price, others more creatively. But time spent thinking about what might go wrong or about how your assumptions might be in error will go a long way toward managing them effectively. Identify and understand the risks, discuss them with the client, quantify them if you are able to do so, and decide whether they need to be addressed as part of price or through other effective mechanisms.

*b. Client Risks*

Sometimes there are risks associated with the client or other team members. For example, if a work plan assigns critical components to the client or another vendor, and they fail to deliver, the financial plan can be in jeopardy. Think in advance about these contingencies. This is especially the province of in-house counsel who should initiate this discussion in fairness to the firm and create a safe environment in which to have satisfying and productive dialogue. With fee structures that share risks and rewards: share them, and clients, like firms, need to own the project risks that fairly rest on their own performance. Then, address these risks up front when possible. The client benefits.

Firms also need to consider a business concept called "the dangerous strategic account."<sup>179</sup> These are accounts in which the

---

179. Dolan, *supra* note 162, at 183. This concept was first outlined in an article by B.P. Shapiro, V.K. Rangan, R.T. Moriarty & E.B. Ross, *Manage Customers for Profits (Not Just Sales)*, HARV. BUS. REV., Sept.–Oct. 1987. Dolan describes this customer profile as follows:

These accounts—and they are typically very large—demand product

costs to serve the account exceed the value generated. To know if this is the case, firms need to assess the full range of costs associated with the potential client to determine the real cost to service it. Businesses refer to this analysis as understanding the “price waterfall.”<sup>180</sup> My business clients more bluntly called it “the leaky bucket.” Review not only what you invoice a client, but assess all factors that may involve hidden costs, both before and after the invoice is sent, to determine the real revenue realized from that client after all costs are calculated.

These hidden costs might include incentives such as prompt-payment discounts, pre-invoice write-downs, post-invoice reductions, late payments, billing terms that do not allow recoupment of actual expenses, services provided without charge at the client’s request or provided in order to hold or maintain the account, and more.<sup>181</sup> This is not to suggest that those items necessarily should be billed to the client, but rather to suggest they should be considered in assessing whether the costs to serve that client exceed the value generated. This is important to determining actual profitability.<sup>182</sup>

I observed this lesson in the business context many years ago. One client had a very large customer that constantly and very aggressively asked for special treatment. Invariably, due to the customer’s size and prestige, my client always granted those requests and felt fortunate if it could negotiate some reasonable reduction in the demands. Finally, the business financial manager

---

customization, just-in-time delivery, small order quantities, training for operators, and installation support while at the same time negotiating price very aggressively, paying late, and taking discounts that they have not earned. These accounts don’t get what they pay for; they get a lot more. They are facetiously called strategic accounts because that’s the justification given when account managers are confronted with the fact that the company is losing money on them.

Dolan, *supra* note 162, at 183.

180. See, e.g., Marn & Rosiello, *supra* note 168, at 51.

181. Many factors determine whether a charge to the client is appropriate or reasonable. But if the firm incurs real expense, it should be included in the price waterfall calculation.

182. See Laura A. Calloway, *Five Billing Tweaks to Keep Good Clients*, LAW PRAC. MAG., May–June 2012, at 12, 13, available at [http://www.americanbar.org/publications/law\\_practice\\_magazine/2012/may\\_june/simple-steps.html](http://www.americanbar.org/publications/law_practice_magazine/2012/may_june/simple-steps.html) (“If a certain type of work just isn’t profitable for you under any circumstances, even to appease an existing client—one who otherwise brings the kind of good work you’re looking for, pays promptly and has the ability to refer more—just come out and say so. The client would much rather hear that and make other arrangements . . .”).

had enough and decided to do a “price waterfall” analysis. To the surprise of the business, for every dollar of product sold to that squeaky-wheel customer, the “all in” cost was \$1.25! Needless to say, this was a great example of a dangerous strategic account. Knowing this, my client was able to make better-informed decisions when the customer made its next request for special treatment.

As work sharing arrangements become more common, it is important to assess not only the risks associated with the work your firm is asked to provide to the project, but to also assess risks from other project participants and to address those contingencies in the price negotiation.<sup>183</sup>

### c. *Firm Risks*

Of course, firms need to look into the mirror and assess their internal risks to the project plan. Staffing is one issue that quickly comes to mind. Inefficiencies and other additional costs that were not anticipated need to be considered. Lack of good data, which results in underestimating costs associated with tasks, may be the most common risk. In general, the firm should bear the financial impact of these internal risks to the plan because they are within the firm’s control. Regardless, they should be thought through and discussed internally before offering a market-valued price.

### 5. *What Will Competition Do?*

And, finally, what will competition do? It is not enough to know that you can meet the client’s needs at a fair price that still

---

183. In addition to financial risks, these risks include ethics and malpractice liability risks. See Rachel M. Zahorsky, *What Risks Do Lawyers Face When Clients Keep Some Legal Tasks In-House or Assign to Outside Vendors?*, A.B.A. J. (May 24, 2012, 10:22 AM), [http://www.abajournal.com/lawscribbler/article/podcast\\_episode\\_04/](http://www.abajournal.com/lawscribbler/article/podcast_episode_04/) (featuring a discussion with John Steele and Brant Weidner stating that ethics guidance and case law suggest that the law firm ultimately is responsible for claims arising out of these scope of representation issues and suggesting that firms are obligated to counsel on the risks of disaggregation and are responsible for overseeing the quality of the in-sourced or outsourced work and undertaking appropriate due diligence on work outsourced or retained by in-house counsel). To mitigate such risks, firms should carefully document scope of representation and allocation of responsibility determinations. *Id.*; see MODEL RULES OF PROF’L CONDUCT R. 1.2(a) cmt. 1 (1983) (“Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations . . . . With respect to the means by which the client’s objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) . . .”).

allows the firm to make a reasonable profit. In today's competitive environment, firms frequently are called upon to respond to RFPs, to make competitive proposals, or participate in auctions. Even without competition that transparent, clients hold the purchasing power and a firm needs to consider how competition will price the same services.

Good market intelligence allows a firm to bring to bear data as well as intuition when trying to forecast what competition will be willing to offer. Of course, lawyers, like everyone else, are subject to the antitrust laws,<sup>184</sup> so directly asking your competitors is not among the legitimate ways of gathering that market intelligence. But every other business spends time and money on collecting and analyzing information about competitive pricing as well as the features of competitive offerings; law firms should make the same investments.

### *C. Collaborate with the Client to Create a Market-Valued Price Proposal*

After getting your act together and determining the fair price you are willing to offer, the next step is to negotiate that fair price and its surrounding terms and conditions.<sup>185</sup> To successfully conclude that negotiation, the firm and the client need to reach mutual agreement as to scope, underlying assumptions, and contingencies. The more attention spent achieving a true meeting of the minds, the greater the chances of success. And one success builds future successes.

#### *1. Scope*

A frequent lament from outside counsel is that clients want alternatives to the hourly billing model, but are unwilling to invest the effort to appropriately scope the project. This unfairly leaves

184. The billable hour, in fact, gained prominence only after the U.S. Supreme Court ruled that fixed-fee schedules, a common-place method of legal billing at the time, violated the Sherman Antitrust Act. *See, e.g., Goldfarb v. Va. State Bar*, 421 U.S. 773, 781–92 (1975).

185. *See, e.g., Kathryn Kirmayer, In Support of Flat Fee Pricing for Complex Litigation Matters*, LAW.COM (May 16, 2012), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202553706301>; William A. Rudnick & Keith Maziarek, *Where Rubber Hits Road: Examples of Alternative Fees*, LAW360 (May 10, 2012, 12:05 PM), <http://www.dlapiper.com/files/Publication/fc6033be-5206-4086-8879-44130b8ef0fe/Presentation/PublicationAttachment/91a10209-f2bd-42af-8133-4af2195cb750/Where-Rubber-Hits-Road-Examples-Of-Alternative-Fees.pdf>.

the firm taking the risk around miscommunications. I know from my experience that the life of in-house counsel is intense. I used to say that I measured time in seconds—that a thirty-second break allowed me to leave one more voice message to one more client chasing me for time I did not have. So I have great empathy for over-worked, stressed in-house lawyers who need to come to a full stop and give a firm his or her undivided attention in order to properly scope a project. But now, from this side of the transaction, I better understand the risks to the firm of not getting it right. So, together, participants need to keep working on clear scoping. Absent agreed scoping, the firm is at real risk of having sold a high-quality draft horse only to find the company thought it bought a Kentucky Derby contender.<sup>186</sup>

The client demanding changed business models on the basis of fairness needs to be fair, in turn. This means making the time to test assumptions together with outside counsel, identify risks, and think creatively through what might go wrong and how those contingencies can be addressed. I grew up in a construction family, and I often use the analogy of construction change orders to identify the type of process that allows the firm to raise and be compensated for issues that arise outside the original scope or for other unexpected changes that occur, given that such issues invariably arise. Together, the firm and client can create appropriate protections for both enterprises.

## 2. *Consider Ethical Rules—Especially Around Risk and Reward Sharing*

Many commentators discuss the idea that alternative arrangements can allow clients and firms to better allocate and share risks and rewards. There are a number of good examples of such approaches in the literature and popular press and discussions of the ethical issues that arise.<sup>187</sup> Think positions through in advance and carefully consider the pros and cons of

186. See Brown, *supra* note 169.

187. See, e.g., The Comm. on Lawyer Bus. Ethics, *Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements*, 54 BUS. LAW. 175, 190–203 (1998) (discussing ethical considerations of various alternative fee options); McMahon, *supra* note 30 (reporting that Rockwell Collins did a whole Lean Six Sigma project around success fees); ACC Value Challenge Toolkit Resource, ASS'N CORP. COUNS., <http://www.acc.com/valuechallenge/> (last visited Sept. 8, 2012) (including numerous examples of various risk and reward sharing structures).

each and whether there might be unintended consequences. Analyze them under the Rules of Professional Conduct.

At times, reward-sharing or risk-sharing can create excellent alignment of objectives. At other times, while aligning some objectives, risk- and reward- sharing structures can create unintended but perverse incentives. Just like my business teams used to joke that “you get what you measure,” they also would joke that “you get what you pay for, literally!” A structure that pays a bonus if a deal closes, for example, can incent deals to close, whether they should or not. Bonuses for early settlement might invite less than optimal settlement terms. I am not suggesting that lawyers will behave unethically, but rewards and punishments can create strong incentives that generate wrong-headed results. For example, much has been written on the ethics of lawyers investing in their clients.<sup>188</sup> Advice and decisions need to be based on the matter’s merits and should not be unduly influenced by reward or risk sharing incentives.

I recall a spirited discussion related to in-house compensation approaches. Should business lawyers have a portion of their compensation based on the financial performance of the business units they counsel? On the one hand, doing so tangibly invests them in and aligns their compensation to the outcomes of the matters on which they counsel, and doing so should help foster, one supposes, high-quality, pragmatic counseling, and timely solutions. On the other hand, some argued that linking compensation to business performance would create a cadre of “yes” men and women who would lack the courage and backbone to say something was inappropriate when “no” should be the answer. And what is the right answer if the business is in bad shape

---

188. See Christine Hurt, *Counselor, Gatekeeper, Shareholder, Thief: Why Attorneys Who Invest in Their Clients in a Post-Enron World are “Selling Out,” Not “Buying In,”* 64 OHIO ST. L.J. 897, 956 (2003) (“The conflicts that equity fees create, and the potential liability for those conflicts, warn against engaging in this practice. Although the ABA Model Rules do not prohibit the practice, changes should be made to ethical rules either to forbid the practice or to restrict the amount of equity involved to an insignificant amount . . .”). But see Kevin Miller, *Lawyers as Venture Capitalists: An Economic Analysis of Law Firms That Invest in Their Clients*, 13 HARV. J.L. & TECH. 435, 463 (2000) (“While there is sometimes tension between client interests and the best interests of the public . . . encouraging law firms to take equity interests in their clients should further law firms’ pursuit of their clients’ best interests . . . [A]ny regulation of these law firms should take into consideration the benefits of such arrangements and should be careful to not provide disincentives for such creative fee structures in the future.”).



financially? Sometimes this is the hardest of all legal work. Some argued that the best lawyers would steer away from troubled businesses so as to avoid negatively affecting their compensation even though their skills might be most needed there. Others argued that the lawyers should share the pain of poor business performance because lawyers should not be any more immune from the consequences of the business's performance than other hard-working employees. The outcome of this discussion is not important. What is important is that the discussion happened.

Lawyers have ethical and fiduciary obligations to ensure that the fees they charge are transparent, reasonable, and not excessive.<sup>189</sup> These rules arguably place some limit on the firm's "up-side" potential, but there are no rules that limit a firm's "down-side" potential. This makes documenting the deal reached particularly important for the law firm involved. When alternative fee structures include risk- and reward-sharing incentives, the firm must ensure that: the client understands both the positive and countervailing incentives, both parties review the ethical considerations, and each party is comfortable that it will achieve what it bargained to achieve.<sup>190</sup>

189. See, e.g., Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 211–12 (1983). The Model Rules of Professional Conduct prohibit lawyers from charging unreasonable fees or overbilling. MODEL RULES PROF'L CONDUCT R. 1.5(a) (2011). The Rules addressing billing focus on value as a major determinant of reasonable fees. *Id.* (noting that factors to consider in setting fees include "the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly," the "experience, reputation, and ability of the lawyer or lawyers performing the services" and "the results obtained"). A lawyer may require the client to pay attorneys' fees in advance of any work performed, but the lawyer is obligated to return any unearned fees. *In re Disciplinary Action Against Swokowski*, 796 N.W.2d 317 (Minn. 2011) (disbarring attorney for failing to return unused balance of retainer to multiple clients); *In re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994) (holding the conduct of trading in special nonrefundable retainer fee agreements subject to appropriate professional discipline); MODEL RULES PROF'L CONDUCT RS. 1.16(d), 1.5 cmt. 4.

190. The burden of proving reasonableness is on the lawyer, and whether a fee is excessive is ultimately a fact questions for the court. Richmond, *supra* note 189, at 213. Importantly, attorneys and clients are free to contract for most billing arrangements so long as the client is fully informed, although, under the Model Rules, a client cannot consent to an unreasonable fee. *Id.* at 216 ("Rule 1.5(b) should be read in conjunction with Rule 1.4(a), such that the client is fully informed about all aspects of the cost of the representation from start to finish."); see also MODEL RULES PROF'L CONDUCT R. 1.4(a), 1.5(b).

These issues particularly raise ethical concerns when the client is not the entity paying for the representation, and the entity paying is the one negotiating

### 3. *Defuse Emotions Through Careful Dialogue*

Price negotiations are emotional and can be quite stressful. As such, they stand every chance of creating discord. General counsel or litigation managers express distrust of outside counsel, fearing they will overpay. Law firms fear they will lose money. Or, if they do not give in to demands, fear they will lose the client, perhaps with disastrous financial consequences. Clients can be overzealous and demand things that they should not or do so in ways that are inappropriate. Firms can be set in their ways and leery of innovations. When discussions get edgy, take the time to step back and remember that the idea is to find a way that the “client is fairly charged, and the firm is fairly protected.”<sup>191</sup> Finding it may require some experimentation and demands careful, nonjudgmental communications.

Trust is the glue that holds it all together,<sup>192</sup> and it takes a respectful partnership to make it work.<sup>193</sup> Nearly everyone that writes on the subject of alternative fees concludes that the key element to success is trust. I would add another: grace. As lawyers operating in pressure-cooker environments, we need to give each other grace. Rather than assuming the worst when something is said or goes wrong, assume there is a rational, appropriate reason for the comment or the circumstance, and give those involved grace. Seek to understand before judging or reacting. Grace will help build trust, and trust will breed success. Before long, a pattern of mutually beneficial, non-hourly based projects result, forming a new set of organizational routines.

---

alternative fee arrangements. Insurance company arrangements with law firms are an example; best practice would be to ensure the fee structure is transparent to all stakeholders.

191. Thank you to my colleague, Larry Espel, for this phrase. It says it perfectly. See also Norm Brodsky, *The Right Price*, INC. (Apr. 1, 2001), <http://www.inc.com/magazine/20010401/22307.html>.

192. Brown, *supra* note 169.

193. See Zahorsky, *supra* note 2, at 42; Shannon Green, *Crunching Law Department Numbers to Reduce Outside Counsel Spend*, LAW.COM (June 15, 2012), [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202559537699&Crunching\\_Law\\_Department\\_Numbers\\_to\\_Reduce\\_Outside\\_Counsel\\_Spend](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202559537699&Crunching_Law_Department_Numbers_to_Reduce_Outside_Counsel_Spend) (identifying a working partnership as a key to success, according to Kurt Stepaniak, General Counsel of Kone, Inc.).

#### 4. *Document the Agreement*

Trust, but verify. After all, as lawyers we advise our clients to document their deals, and we should document our own. Our ethics rules require it. The documentation should reflect the project's scope, staffing, and contingencies. It will include the "W's" of the work: who does what, when, where (in what organization), why, and how. Element by element, it will document risk- and reward-sharing components.<sup>194</sup> It will include a change order process. A good document will build in safety valves. The very work of putting documentation in place will identify additional areas that need more discussion. And then together the client and firm should invest the time to keep the documentation up to date as the deal changes over time. Inevitably it will.

#### D. *Measure Success and Learn from Each Project*

Did you make a profit? Assess whether you did better or worse than predicted. Solicit client feedback. Spend time asking what the team could do better in the future or could have done "more of" or "less of" during the project.<sup>195</sup> Regardless of your assessment techniques, the important thing is to track the successes, identify the gaps, and develop a strategy for addressing them. Create a continuous feedback loop. This information-gathering for the firms' and clients' benefit is an iterative process. It yields data, which has as its objective continuous process improvement. Judging and casting blame does not serve that purpose. Continuous improvement ultimately will drive repeatable successes.<sup>196</sup>

There are those that propose that success should be determined by comparing project costs against what would have resulted if the project had been billed at hourly rates. They argue

194. The ACC Fee Primer offers good tools to help a firm implement value-based fees. See generally ASS'N CORP. COUNS., *supra* note 5.

195. See Marshall Goldsmith, *Try Feedforward Instead of Feedback*, MARSHALL GOLDSMITH LIBR. (2002), [http://www.marshallgoldsmithlibrary.com/cim/articles\\_display.php?aid=110](http://www.marshallgoldsmithlibrary.com/cim/articles_display.php?aid=110) (discussing his concept of "feedforward," a constructive method of communicating that focuses on future improvements rather than past failures).

196. Jeffrey Carr, *Value Practice: After Action Reviews as Critical Step in Adding Value: Focus on FMC Technologies, Inc.*, ASS'N CORP. COUNS. (Sept. 2008), <http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=40522> (summarizing interview with Jeffrey Carr, then-Vice President, General Counsel, and Secretary of FMC Technologies).

this allows a client to measure “savings” and the law firm to determine whether it “suffered a loss.” I am opposed to this approach. First, it sets up a measurement that assumes that one party wins and the other loses. It also sets up a “what if” world that creates incentives to revert to hourly billing models. It limits one’s creativity in demonstrating value (which can never exceed the hourly rate) and so fails to reflect true value—implying that all legal services are commodities.<sup>197</sup> To measure value, we need to learn how to measure value not hours. Is measuring value hard? Of course it is. But shadow hourly billing does not assist in this endeavor.

Clients will be better served by measuring success against articulated goals: outcomes achieved, quality observed, services provided, timelines met, and predictability of costs and budgets met. I believe firms will be better served by determining profitability, both in terms of actual profit dollars and percentages, and in comparison to whether the project was more or less profitable than the firm’s mean or median profitability for other projects. If the consensus conclusion is that fees based on hourly rates are not reflective of value, then clients should not be measuring whether they “got their money’s worth” by reference back to hourly rates. If we mean to kill the billable hour, then we should not reincarnate it as a measurement system. From a quality of life and efficiency perspective, I know many who would be pleased to see the billable hour “dead, dead and gone.”<sup>198</sup> The hidden benefits of a sharp shift away from the billable hour cannot be underestimated.<sup>199</sup>

197. Kirmayer, *supra* note 185.

198. See generally BLOOD, SWEAT AND TEARS, *And When I Die, on BLOOD, SWEAT & TEARS* (Columbia 1968).

199. In her recent article, *Why Women Still Can’t Have It All*, Anne-Marie Slaughter, former Director of Policy and Planning at the State Department, focused a bit of specific ire at law firm billable-hour business models. THE ATLANTIC, July/Aug. 2012, at 84, 94, available at <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>. “Nothing captures the belief that more time equals more value better than the cult of billable hours afflicting large law firms across the country and providing exactly the wrong incentives for employees who hope to integrate work and family.” *Id.*; see also Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 225 (1999) (“Hourly billing pressure may be the most serious problem faced by the legal profession. It has robbed many lawyers of the possibility of balanced lives, has caused a decline in mentoring, collegial relationships, and professional satisfaction, and has had a marked corrosive effect on the integrity of many lawyers . . .” (footnote omitted)); Nancy

This discussion of measurement systems is not meant to imply we should stop tracking how long it takes to complete a task. Quite the contrary, the purpose of collecting that information will shift from invoicing to tracking costs and productivity. It will be an important internal firm measure only, akin to throughput or line speed in a manufacturing plant. For those familiar with six sigma, equally important to tracking throughput or speed is to track all countervailing measures—those other attributes that contribute to a high-quality, cost-effective service offering, which must not be negatively impacted by a process change.

#### IV. SMALL FIRMS AND SECONDARY MARKET FIRMS ARE WELL POSITIONED TO CAPTURE THIS OPPORTUNITY

Finally, as a practitioner in a smaller firm, I believe that small firms and secondary market firms are uniquely positioned to capture the opportunity created by these looming changes in legal practice. The ABA reports that non-hourly billing is the “weapon of choice” for midsized firms.<sup>200</sup> I propose that it’s an even better strategy in the hands of small firms and firms in secondary markets, because they provide high value for their cost, maximum flexibility, the ability to quickly shift focus and be proactive, and have modest

---

B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117, 179 (2012); Bartlit, *supra* note 21 (“Use of technology and non-hourly billing creates a much more collegial and family favorable culture. There is no ‘face time’—the frequent informal ‘requirement/preference’ that lawyers be present at the firm evenings and weekends to ‘prove’ they are working.”); Elizabeth Dilts, *An In-house Take on Women ‘Having it All,’* LAW.COM (July 13, 2012), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202562763293> (responding to Slaughter that, in contrast to law firms where the billable-hour culture is an “albatross,” in-house counsel have an enormous difference in lifestyle, not because they work less hard, but because they do not bill by the hour and have more schedule control); cf. Frank Partnoy, *Unlocking Yourself From the Clock*, WALL ST. J., June 22, 2012, <http://online.wsj.com/article/SB1000142405270230476530457747845033186784.html>. But see Debra Cassens Weiss, *Employees Who Work at Home May Pay the Price in Raises and Promotions*, A.B.A. J. (July 17, 2012, 7:05 AM), [http://www.abajournal.com/news/article/employees\\_who\\_work\\_at\\_home\\_may\\_pay\\_the\\_price\\_in\\_raises\\_and\\_promotions/](http://www.abajournal.com/news/article/employees_who_work_at_home_may_pay_the_price_in_raises_and_promotions/) (reporting that lack of “passive face time” results in smaller raises and fewer promotions, demonstrating the long distance yet to go on the use of technology to assist in life balance (citing Kimberly Elsbach & Daniel Cable, *Why Showing Your Face at Work Matters* (June 19, 2012), <http://sloanreview.mit.edu/the-magazine/2012-summer/53407/why-showing-your-face-at-work-matters/>)).

200. Zahorsky, *supra* note 2, at 47.

data sets to manage and analyze. All this combined yields greater marginal value.<sup>201</sup>

The downturn in the market hit east coast “Big Law” firms especially hard.<sup>202</sup> Hiring is down dramatically in those firms, and those high-quality lawyers who just missed the now-even-more-demanding hiring cut-off must go somewhere.<sup>203</sup> It’s one of those “well-known secrets” of the legal profession that not all top talent chooses to practice at large firms or in primary markets. Small firms frequently offer high-quality legal talent in compact, cost-effective packages. Secondary markets offer high-quality legal talent in lower cost-of-living jurisdictions. The current hourly rates for the top talent in secondary markets and small firms are substantially lower than in large firms and primary markets—often half of what big firms charge.<sup>204</sup> The point is that very talented lawyers can be found at much lower rates in smaller firms and secondary markets, and cost-conscious legal executives know this to be true.

Because of their smaller size and correspondingly more manageable financial picture, smaller firms have the ability to react quickly to opportunity. Smaller firms simply have less bureaucracy. Management structures are clearer, political considerations more manageable, and decision-making more direct. Change should be easier to manage. A recent survey shows that 80% of firms have centralized approval for alternative fee arrangements, 45% have alternative fee committees, but only 60% are using some form of cost analysis.<sup>205</sup> And less than one-third track matter-profitability,<sup>206</sup>

201. At least one commentator sees a similar strategic opportunity for mid-market law schools. *See* Chambliss, *supra* note 13, at 333.

202. *Id.* at 330 (“Until recently, a cartoon map of the U.S. legal profession would have had a super-sized midtown Manhattan at the center, with the Harvard crest to the upper right and the scales of justice, for D.C., below . . . . Today’s cartoon map would have a big red downward arrow over Manhattan and bolded black and white chomp marks framing the map on all sides.”).

203. David Cohen, *A ‘Buried Treasure’ Value Proposition for Corporate Legal Departments*, LAW.COM (June 25, 2012), available at [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202560516221&A\\_Buried\\_Treasure\\_Value\\_Proposition\\_for\\_Corporate\\_Legal\\_Departments](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202560516221&A_Buried_Treasure_Value_Proposition_for_Corporate_Legal_Departments). Cohen argues that those lawyers make a great choice for staff-attorney positions in large firms, to be used to create a higher-skilled, alternative offering to outsourcing document review. *Id.* I imagine many of them see a brighter future by taking their skills to smaller firms or smaller markets.

204. *Id.*

205. Henson, *supra* note 26.

206. *Id.*

even though this measurement may be the most important. Every one of these key activities that is important for implementing market-valued pricing should be less cumbersome and more efficiently developed in a smaller firm; the leaner organization should have the competitive advantage. In the past, some questioned whether smaller firms had the capacity—literally the bodies—to handle large, complex matters. Today, many of those bodies are outsourced, and small firms can manage those outsource providers as well as large firms at a fraction of the cost, serving as project managers and integrators.

A recent study indicated that most firms that use alternative fee arrangements do so at the request of their clients.<sup>207</sup> Only one-third feature alternative billing arrangements in their marketing.<sup>208</sup> General counsel complain they are lobbying firms for more alternative fee arrangements but they question whether firms are really committed.<sup>209</sup> It is precisely a gap like this—between a purchaser's desire and the incumbent's offering—that creates a wedge of opportunity. Once its clients are on board, a small firm can readily shift from the current reactive approach to the desired proactive approach. Literally, a small firm could change its web page and train its team on a new pricing strategy and implementation tactics in weeks, not months. Imagine how much more difficult it would be to effect that change in a large, multi-office, geographically dispersed firm.

Less than one-third of firms set annual targets for alternative billing.<sup>210</sup> If a firm wants non-hourly billing arrangements, it needs to make them a firm priority, set targets, measure their profitability, and assess and plan for success. Rather than viewing non-hourly structures as concessions to clients, small firms should embrace them and treat them as a key business strategy—a market-driven element of their product portfolio.<sup>211</sup> Small firms are perfectly suited to be proactive and to fill this gap identified by their clients.

Smaller organizations, by definition, have smaller data pools. Manageable data simplifies deployment of basic knowledge management solutions and more readily enables in-depth, unit-cost analysis. This manageable amount of data enables small firms to

207. CLAY & SEEGER, *supra* note 25, at 20; *see also* Henson, *supra* note 26.

208. Henson, *supra* note 26.

209. Henson, *supra* note 44.

210. Henson, *supra* note 26.

211. *Id.*

generate usable information to help take guesswork out of alternative fee proposals and reduce the risk of shifting to a profit-driven, market-valued pricing model. All it takes is will and a few outsourced services.

Together, small firms and secondary market firms by their very nature already have lower overhead and cost structures and more transparency as to where efficiencies might be found. With today's collaboration tools and virtual networks, it is a clear cost savings alternative to put together a virtual team that places various elements of work within a large project at better price points. Small firms and those in secondary markets are especially good candidates for handling some or most of those unbundled tasks within a case, or nicely serving the integrator role clients so desire. In short, they offer overall better marginal value.<sup>212</sup> And technology becomes the great leveler, enabling these smaller firms and secondary market firms to effectively compete with larger firms.<sup>213</sup>

## V. CONCLUSION

To turn change into opportunity, firms need to be clear-eyed about the scope and pace of change in our industry. By mastering the seven non-legal skills needed for success and deploying business pricing tools into the firm's pricing activities, it can shift to a market-valued, profit-driven pricing model and away from the billable hour. Each successful implementation will breed more successes. And planning for success improves the chances of success.

Thinking about my many years as in-house counsel, some steps in-house counsel can take to plan for success include:

- Take the time to jointly and fully scope projects with your outside counsel. You'll recover that investment many times over.
- "Value" does not mean cheap. Understand that true value-based fees do not always mean lower costs on an item-by-item

212. Adopting a market-valued, profit-driven pricing model is not without risk for small firms. If a project takes a difficult turn and the client is not willing to renegotiate the terms of the arrangement, smaller firms may suffer a greater proportional impact. But by analyzing opportunities carefully, relying on good quality information to price tasks, and deploying proven business pricing tools, these risks can be managed.

213. BD. OF GOVERNORS' CHALLENGES TO THE PROFESSION COMM., *supra* note 6, at 2.



basis. Some tasks will cost less; others fairly may cost more.

- Take the time to think through contingencies and unintended consequences. Everyone, and especially the client, will benefit.
- Be prepared to openly discuss your perceptions of value, and be prepared to attach dollar figures to them.
- Play fair. If the project moves beyond the original scope, agree to renegotiate.
- Respect and trust your firms.<sup>214</sup> Give the team grace. The objective is continuous improvement.
- Focus on maintaining high-quality collaboration.
- Create opportunities for feedback on your internal team's performance.
- Once the fee arrangement is in place, insist on good-quality project management.
- Focus on system efficiencies, and avoid micromanaging and suboptimization.
- When you make a risk decision, own it and be accountable to the team for it.
- Don't be so set on one type of alternative arrangement that you fail to carefully consider others. Sometimes an hourly rate may be in your best interest.
- Respect the data firms share with you. Use it only for the purposes agreed.
- Document the deal; agree to a change order process.
- Be trustworthy.

Steps firms can take to plan for success include:

- Learn the language of your client's business, then talk to your clients in their language.
- Take the time to jointly and fully scope the project with your client. You'll also recover that investment many times over.
- Think carefully about what is in scope but spend equal time defining what is out of scope.
- Manage client expectations carefully. Remember that if you are selling a draft horse you do not want the client to be expecting a derby winner.
- Understand and help facilitate client risk assessments and risk-management decisions; respect a client's choice not to do low-

---

214. This does not mean that anyone should be naïve. My grandmother often told me that "if someone shows you who they are, you should believe them." She meant that people should be judged by what they do, not by what they say. And when they do something inappropriate, those actions tell their story.

risk work because it is a significant cost-savings opportunity.

- Play fair. If the project moves beyond the original scope, agree to renegotiate.
- Respect and trust your clients. Give the team grace. The objective really is continuous improvement.
- Develop a change order process that works for handling the unexpected twists that surely will arise. And use it. That's the bargain.
- Enhance your team's project management skills.
- Become that sought-after integrator.
- Master internal financial metrics and share results at a high level with your client.
- Become comfortable talking about the value you add to the calculation—making it real and measurable. Talk about value in the client's language.
- Plan so the project is bounded by both time and events.
- Document the deal.
- Never compromise on quality—remember that fee agreements do not dictate professional effort.
- Be trustworthy.

Law firm business models are rapidly evolving away from the billable-hour model to a profit-based model supported by market-valued pricing which uses commonly accepted business pricing tools. This change is driven by a number of factors, including a shift in purchasing power as the result of an oversupply of legal services, displacing technologies, and globalization. My experiences in the consumer electronics industry and in-house teach me that these changes will be profound and happen faster than even knowledgeable thought leaders predict. Rather than ending the practice of law as we know it, I anticipate these changes will provide great opportunities, especially for small firms, firms in secondary markets, and those lawyers that embrace the new skills demanded by this new legal order. My parting advice is to become that sought-after integrator. And for those of my vintage, join the net generation party and rock on.<sup>215</sup>

---

215. See generally DAVID ESSEX, *Rock On, on ROCK ON* (Columbia Records 1973) ("And where do we go from here?; Which is the way that's clear? . . . Rock on.").